APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 74-6593

DANIEL WILBUR GARDNER, *Petitioner*

v.

STATE OF FLORIDA, *Respondent*

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

**PETITION FOR CERTIORARI FILED,
MAY 24, 1975**

CERTIORARI GRANTED, JULY 6, 1976

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INDEX

CHRONOLOGY

August 22, 1973: Indictment returned by Citrus County, Florida, grand jury charging that petitioner "did unlawfully and from a premeditated design kill Bertha Mae Gardner . . . by striking her with a blunt instrument . . . in violation of Florida Statute 782.04(1) [which defines first degree murder]".

August 29, 1973: Petitioner moved for a psychiatric examination.

September 5, 1973: Petitioner determined to be indigent and counsel appointed to represent him.

October 17, 1973: Psychiatric examination ordered.

January 7, 1974: Selection of Petitioner's trial jury began.

January 8, 1974: Presentation of State's evidence began.

January 9, 1974: Petitioner filed form waiving right to testify.

January 9, 1974: Psychiatric Evaluation Report of Dr. George W. Bernard filed.

January 10, 1974: Jury returned verdict finding petitioner guilty of first degree murder.

January 10, 1974: Trial court ordered pre-sentence investigation report.

January 10, 1974: Jury returned advisory sentencing verdict recommending petitioner be sentenced to life imprisonment.

January 11, 1974: Psychiatric Evaluation Report of Dr. Frank Carrera, III, filed.

January 22, 1974: Petitioner filed motion for new trial.

January 28, 1974: Pre-sentencing investigation report submitted to trial court.

January 30, 1974: Trial court filed findings of fact and sentenced petitioner to death.

February 5, 1974: Petitioner filed second motion for a new trial.

March 21, 1974: Trial court denied motions for a new trial.

April 5, 1974: Petitioner filed assignments of error.

February 26, 1975: Supreme Court of Florida affirmed petitioner's conviction and sentence, with two Justices dissenting.

April 7, 1975: Mr. Justice Powell entered an order staying execution of petitioner's death sentence "pending the timely filing and disposition by this Court of a petition for a writ of certiorari . . . . In the event the petition for a writ of certiorari is granted, this stay is to continue pending the issuance of the mandate of this Court."

May 24, 1975: Petition for certiorari and motion to proceed *in forma pauperis* filed in Supreme Court of the United States.

July 6, 1976: Petition for certiorari and motion to proceed *in forma pauperis* granted, limited to Question Two.

[Indictment]

In the Circuit Court of the Fifth Judicial Circuit of the State of Florida, for *Citrus* County
At the *Fall* Term Thereof, in the Year of Our Lord One Thousand
Nine Hundred and *Seventy Three* County, to-wit: *Citrus*

In the Name and by Authority of the State of Florida:

The Grand Jurors of the State of Florida, enquiring in and for the body of the County of *Citrus* upon their oaths do present that *Daniel Wilber Gardner*

late of the County of *Citrus* aforesaid, in the Circuit and State aforesaid, laborer, on the *30th* day of *June* in the Year of Our Lord, One Thousand Nine Hundred and *Seventy Three* with force and arms at and in the County of *Citrus* aforesaid,

did unlawfully and from a premeditated design kill Bertha Mae Gardner, a human being, by striking her with a blunt instrument, a more particular description to this Grand Jury unknown, did inflict in and upon the body of the said Bertha Mae Gardner, a mortal wound and of which mortal wound the said Bertha Mae Gardner did die, in violation of Florida Statute 782.04(1).

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CITRUS FLORIDA
WALT COBB, CLERK

Contrary to the Form of the Statute, in such cases made and provided, and against the peace and dignity of the State of Florida.

Assistant State Attorney, Fifth Judicial Circuit of Florida

* The record in the Florida Supreme Court consists of a three volume Transcript of Record (Volume I is paginated 1-73, Volume II is paginated 1-200, and Volume III is paginated 201-360), and a Supplement to Transcript of Record. References to the Transcript of Record will hereinafter appear in brackets and will include both a volume and a page number.

[Motion for Psychiatric Examination]

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR Citrus County. Criminal Case No. 73-1325-FM-A-01.

STATE OF FLORIDA)
-vs-)
DANIEL WILSUR GARDNER,)
Defendant)

MOTION FOR PSYCHIATRIC EXAMINATION

Comes now the above styled defendant, by and through his undersigned attorney, and respectfully moves the Court to order a psychiatric and psychological examination of said defendant under the provisions of Chapter _____, Florida Statutes Annotated and CrPR 1.210.

I DO CERTIFY that copy hereof has been furnished to W. T. Green Assistant State Attorney, Citrus County, 508 N.E. Citrus Ave., Crystal River, Florida 32629 by mail (hand) this 29th day of August, 19 73

Michael T. Kovach
Assistant Public Defender
Attorney for Defendant
213 N. Apopka Ave.
Inverness, Florida 32650

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CITRUS
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[Appointment of Counsel]

IN THE CIRCUIT COURT OF CITRUS COUNTY, FLORIDA

CRIMINAL CASE NO. 73-132

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CITRUS
WALT COBB, CLERK, FLORIDA

STATE OF FLORIDA)
vs.)
Daniel Wilsur Gardner)
Defendant)

ORDER OF REAPPOINTMENT

THIS CAUSE coming on this day to be heard upon Defendant's request that this Court reappoint the Public Defender's office to represent him and this Court further finding that said defendant is indigent within the meaning of Rule 3.111(b)(4) of the Florida Rules of Criminal Procedure, and the Court being otherwise fully advised in the premises, it is thereupon

ORDERED AND ADJUDGED as follows:

(1) That the defendant be, and he is hereby declared to be indigent within the meaning of Rule 3.111(b)(4) of the Florida Rules of Criminal Procedure; and

(2) That the office of the Public Defender for the Fifth Judicial Circuit in and for Citrus County, Florida, is hereby reappointed to represent said defendant in the above-styled cause and in any other controversy pending between the State of Florida and the said defendant.

DONE AND ORDERED this 5th day of September, 19 73 at Inverness, Citrus County, Florida.

J. W. Boott
Circuit Judge

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[Order for Mental Examination]

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR Citrus County. Criminal Case No. 73/1325/CF-A-01
73/132a/CF-A-01

STATE OF FLORIDA)

-vs-)

Daniel Wilbur Gardner,)

Defendant)

ORDER FOR MENTAL EXAMINATION
(See applicable provisions of Chapter 917 FSA and CrPR 3.210)

Subject case being before the Court and it having been brought to the attention of the Court that there is reasonable cause to believe that the defendant is insane and the Court being under a duty to determine the defendant's mental condition, it is, upon consideration

ORDERED that the following two disinterested qualified experts be and they hereby are appointed to examine the defendant and to make written reports to this Court as to the mental condition of the defendant at the time of the alleged crime and at the time of their examination. The said written reports shall be mailed and delivered directly to the undersigned Circuit Judge, together with the statement of fees for said examination:

Dr. George W. Bernard
University of Florida
Medical Center
Gainesville, Florida

Dr. George P. Barringer
University of Florida
Medical Center
Gainesville, Florida

That the Sheriff of Citrus County, Florida, be and he is hereby authorized and directed to make all necessary arrangements, including safe and secure transportation, for said defendant to be examined by the aforesaid experts at the earliest convenient time and place consistent with the security of the prisoner.

That the Clerk of this Court be and he is hereby authorized and directed to furnish conformed copies of this Order to the Doctors, the Attorneys, the Sheriff and the defendant; the undersigned Circuit Judge shall cause distribution of the Doctor's report to be made to the State Attorney and attorney for defendant and shall file the original of said Doctor's report with the Clerk of the Circuit Court who shall forthwith seal said Doctors' report and maintain the same as a confidential and privileged matter of the record herein, unless and until otherwise ordered by this Court; all at the expense of Citrus County, in accordance with the laws made and provided for such cases.

That the attorneys of record in this case are hereby authorized to communicate with the appointed Doctors on a confidential basis and furnish them such relevant information concerning the defendant and circumstances attending this case as they may deem helpful and proper in the premises.

DONE AND ORDERED in Chambers, at the Citrus County Courthouse, Inverness, Florida, this 12th day of October, 1973.

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CITRUS COUNTY, FLORIDA
WALT CRITCHLOW, CLERK

Circuit Judge

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[Waiver of Right to Testify]

WAIVER OR ELECTION TO TESTIFY

I, the Defendant herein, having been fully advised to my right to take the stand and testify in my own behalf and the possible consequences thereof, do hereby freely and voluntarily elect (not to) (~~to~~) take the witness stand and testify in my own behalf.

Defendant

Dated: Nov. 9, 1973

[PSYCHIATRIST'S REPORT:
DR. GEORGE W. BERNARD]

Daniel Wilbur Gardner
Citrus County

This 39 year old white widowed male prisoner was seen in psychiatric evaluation at the Citrus County Jail by Drs. Barnard and Carrera on 6 November 1973. Psychiatric evaluation had been requested by the Honorable John Booth, Judge of the 5th Judicial Circuit in and for Citrus County. This is Case 73-1325-FM-A-01. Mr. Gardner said he was arrested June 30, 1973 and charged with first degree murder of his wife, Bertha. The alleged crime is said to have taken place about midnight Friday, 29 June, 1973. He related the following story.

On the day of the alleged crime, he woke up at his home with his wife and four children. He had breakfast. Later that morning he went with a friend, Wayne Ritchie. He had several beers, and about 11:30 he had two half cups of vodka and orange juice with Ritchie and a friend, Jerry. They went to a beer tavern called My Brother's Place, and he had some more beers but could not estimate how many. Later he went to the Sugar Mill Tavern and drank whiskey and coke. About 11:00 P.M. his wife came in. They drank together for about 30 minutes and then left.

He said past this point he has difficulty with his memory and with the time sequence. At his house he asked where the children were, and she did not tell him. He said she acted as though the drinks were getting to her. He went next door to his mother-in-law's trailer, but the children were not there. While there, his wife walked up in the nude. His wife fell several times. He and another man, Buckshot, carried his wife to the house but Buckshot fell and Gardner's wife hit her eye on the door. Later, in the house, he tried to bathe her but she fell in the tub several times. He lay on the bed with her, backslapping something in her crotch between the legs. He said it seemed to be about a foot in diameter and had reddish tint about the same color as his wife's hair, but he did not think it was part of her. Later they lay on the bed together. He was exhausted. The next morning he woke up, called her name

a few times and noticed she was not breathing. He gave her mouth-to-mouth resuscitation. He then ran next door and asked for them to call an ambulance. He returned and gave her mouth-to-mouth resuscitation. When the ambulance driver came, he said it was no longer any use. The police came, stayed a short time and then arrested him. He has been in jail since that time.

Previous Criminal Record: In the early 50's, he was charged DWI and reckless driving. He had a suspended license and was in jail 20 days. In 1953, he was investigated with a girl who was connected with drugs and released after one day. In 1960 he was charged with assault on his first wife, and the case was dismissed. In 1968, he was charged with attempted murder, but it was a mistake. He was not placed in jail and the charges were dismissed. In 1969, he was charged with assault. His wife brought the charges after an argument, and she was afraid of him. The charges were dropped. In 1971, while he was drunk, his wife brought charges of assault. He said he popped her on the backside and left a bruise. The charges were dropped.

Past History: He was born in Homosassa February 9, 1934. His mother is about 60. His father died three months before Mr. Gardner was born. His mother remarried about 6 months later and lived with his step-father until he was 12. They were separated for about a year and then went back together. Mr. Gardner is third in a sibling group of three. He finished the 7th grade and quit school at age 15. He had failed the 7th grade two times because he lacked interest in school. He was never suspended or expelled. After his mother and stepfather separated at age 12, there was no one to care for him and he was sent to a boys' home in Jacksonville where he remained until age 15. At age 15 he was discharged to his mother and step-father and he went to work. He entered the Air Force in 1952 and was discharged with an honorable discharge in 1956 at age 22. After his discharge from the service, he has worked on a commercial fishing boat and as a carpenter.

He married for the first time in 1958 when he was 24 and his wife was 21. They were married seven years and had no children. He left her. He was married for the second time in

1956 when he was 33 and his wife was 21. They had four children by this marriage. He felt the marriage went well for most of the time but for several months prior to the time of the alleged crime, he and his wife had more trouble after his mother-in-law moved in next door. He thought his mother-in-law was an alcoholic and several times when she has babysat for them, she has passed out. About three weeks prior to the time of the alleged crime, his wife was out with his step-brother, Johnny, and he felt they had had sex. He left for a brief time and then talked it over, and they decided to stay together.

Medical History: He has had no operations and no serious illnesses. He had a broken collar bone while he was in the service. In 1953 he had an automobile accident and was unconscious for a few minutes. He has had no V.D., no fits convulsions, seizures and no suicidal attempts. He has had visual hallucinations one night after drinking heavily and he thought he saw a snake in moss. He has had no psychiatric treatment and has never been a patient in a mental hospital.

He has used marijuana several times, but no other illegal drugs. He began the use of alcohol at age 16 and drank heavily every weekend since 1956. He has had the shakes quite a bit but no DT's other than the visual hallucination mentioned above. During the past year, at times he will go 2-3 days drunk. He has had no treatment for his alcohol excess. His sister died of alcoholic cirrhosis of the liver. His father was a heavy drinker, and his half-brother a heavy drinker.

Mental Status: The prisoner is a man who appears his stated age. He is oriented for person, place, situation and partially oriented for time in that he knows the correct year, day of the month, and day of the week, but thinks it is October instead of November. He has a mild recent memory deficit, but his remote memory other than the time surrounding the time of the alleged crime appears intact. He can abstract proverbs without difficulty and solve practical problems which are given him. There is no indication of a thought disorder, specifically no looseness of associations or delusions. His affect is said to be appropriate. He is depressed and has a sad facial expression, but says he is unable to show feelings and specifically he cannot cry over the loss of his wife. He does not think he killed her, but thinks she fell and injured her internal organs and bled to death.

Summary and Conclusions: This is a 39 year old white widowed male prisoner charged with first degree murder. On psychiatric examination at this time, there is no indication of psychosis. It is my medical opinion the prisoner is competent and able to assist counsel in the preparation of his defense. It is also my medical opinion had he not been under the influence of alcohol at the time of the alleged crime, he would have been competent, knowing right from wrong and being capable of adhering to the right. It is my medical opinion the prisoner is an alcoholic, and at some point the courts may wish to have him placed on an Antabuse program wherein he receives Antabuse daily from a druggist. It is also my medical opinion he is depressed over the death of his wife and could benefit from an antidepressant such as Elavil, 50 milligrams three times a day.

George W. Barnard, M.D.

[PSYCHIATRIST'S REPORT: DR. FRANK CARRERA]

Daniel Wilbur Gardner
Citrus County
Case #73-1325-FM-A01

This 39 year old, white, widowed man from Homossassa, Florida was seen for psychiatric evaluation by Drs. Carrera and Bernard on Tuesday, November 6, 1973 in the Citrus County Jail, Inverness, Florida. Psychiatric examination was ordered by the Honorable John Booth, Judge of the 5th Judicial Circuit, in and for Citrus County, Florida.

PRESENT ARREST AND CHARGES: Mr. Gardner said that he was arrested on June 30, 1973, a Saturday morning, in Homossassa, Florida. He reported that he was charged with the 1st degree murder of his 27 year old wife, Bertha. He said that the alleged murder had occurred at around midnight on June 29, 1973 in the Gardner home. Mr. Gardner said that the papers had reported that his wife had died from a "a beating".

HISTORY SURROUNDING THE PRESENT ARREST: On the day of the alleged crime Mr. Gardner said that he woke up at his home at 7:00 a.m. and that his wife and four children were there. They breakfasted together and then Gardner stayed home and watched television because he had been out of work for approximately 1 month. At 10:00 a.m. a friend, Wayne Ritchie, came to the house accompanied by a 14 year old boy, Calvin. Ritchie invited Gardner to go have a beer and at around 10:00 a.m. Gardner and Calvin left in Ritchie's car. They drove to a convenience store where he bought one six pack of beer and then drove to a cousin's house, Denny Oliver, where he drank two beers. While there, a Jerry Oliver came to the house and invited Gardner and Ritchie to go have a drink. These 3 then went in Ritchie's car, bought orange juice at another convenience store and then parked at the end of a road where the three of them drank vodka and orange juice beginning at about 11:30 a.m. Mr. Gardner reported that he drank two half-cups of vodka with orange juice there. They

then went looking for more drinks and rode around partying and ended up at a beer tavern called "My Brother's Place" on Highway 19. Mr. Gardner said that he remembered being there drinking beer but he could not recall how many he had drunk. He said that he did not have lunch that day and he did not remember all that happened at the tavern but did remember talking to the proprietor probably until 2:00 or 3:00 p.m. about whether Mr. Gardner wanted to lease the tavern from the owner. Mr. Gardner said that he recalled Ritchie and Jerry Oliver there at the tavern bar while he sat at a table.

Mr. Gardner said that the next thing he remembered he was sitting at the Sugar Mill Tavern in Homossassa with two women at about 10:30 p.m. He then reported that his wife came in to the tavern at approximately 11:00 p.m. and met him as he was walking back to the table with the two women. His wife asked him to get her a drink which he did and then he suggested to his wife that they join the two women and they did. According to Mr. Gardner, his wife did not seem to be upset about anything and after about 20 minutes the two other women got up and left without any arguments or fussing. At the Sugar Mill Tavern Mr. Gardner said that he was drinking whiskey and coke. He remembered asking his wife how she had gotten to the tavern and where the children were but he did not remember what her answer was. His wife and he finished their drink and then got up and started toward the door. Mr. Gardner then saw a friend, Oscar Lyle, to whom he waved and told him he would see him later although he was not planning to come back to the tavern. He said that he had his arm around his wife when he got to the door and asked Ritchie if he was ready to take them home. Ritchie walked out toward the car and the couple followed. He remembered having his arm around his wife and opening the door of the car for her but then said he has no memory for what occurred until after they had arrived home. The next thing he remembered was that his wife and he were out of the car at the house and the car was backing out. Mr. Gardner then recited several events which occurred from that point on but said, "I can't put time or order to the next memories".

Inside the house he asked his wife where the children were and he reported that his wife had a smirk on her face and said, "wouldn't you like to know?" and dared him to find out. When Gardner asked her if the children were with her mother his wife said, "go find out". Mr. Gardner then went to his wife's mother's trailer which was nearby and knocked on the door. He said that his mother-in-law answered the door but that she was so drunk that she could not stand up. When he asked her where his children were she reportedly said, "if you weren't such a sorry s.o.b. you'd know where your kids are". She then slammed the door in Gardner's face. Mr. Gardner said that at that moment he felt a loud, piercing scream in his head like "something went over me . . . I felt light . . . a floating sensation . . . a hate feeling". He then kicked in the door to the trailer and hit his mother-in-law in the mouth with the door. He then said he saw his wife walking up to the trailer and that she was nude. The next thing he remembered is his wife being in the middle of the road while he had her by the arms trying to get her into the house. He remembered she fell back on the road and "I could feel she was hurt . . . at this point I wasn't mad at anybody . . . I was just floating and things were happening without my control . . . I tried to pick her up . . . she fell again . . . walking back to the house she fell on the dirt again". Mr. Gardner said that he then went to his mother-in-law's trailer to ask the man who was in there to help him get his wife into the house and they both carried her to the house while she fought them. At the doorstep Mr. Gardner said that the man who was helping him tripped and that his wife fell on her left side and hurt her right face. He remembered seeing the cut on her right eye after she had hit the door frame. He next remembers being with his wife in the living room and hearing "crazy noises . . . echos . . . kids crying . . . a sensation of somebody or something in the room . . . a frightened feeling". He then remembers helping his wife get into the tub to wash the sand off of her and his trying to help her stand up. He remembered reaching down to turn the water off and his wife slipping and falling into the tub. He thinks that he remembered that she was laughing at this time. He tried to

help his wife up, turned the shower on and she fell again. He then helped her out of the tub. The next memory he has is being in the bed with his w fe. He remembered slapping here with the back of his hand on her crotch because it seemed like "something was there . . . looked like something with a lot of hair . . . one foot in diameter . . . reddish tint to it . . . same color as my wife's hair . . . I didn't think it was part of her". He next remembers going to sleep and being exhausted and remembered his wife arguing with him and saying that he would "pay for it". He remembered putting his arm across her shoulder and then fell asleep.

The next morning Mr. Gardner said that he woke up suddenly, called his wife's name, shook her by the shoulder several times but got no answer from her and he noticed that she was not breathing. He rolled his wife on the bed and shook her face and he thought that she took two light breaths and then stopped. Mr. Gardner tried mouth to mouth resusitation for two minutes and then went to his mother-in-law's trailer to have them call an ambulance. He rushed back into the house then and administered more mouth to mouth resusitation and continued doing that until the ambulance arrived. The ambulance driver then told Mr. Gardner that there was no more use to his trying to resusitate his wife. Mr. Gardner said that he then "went to pieces" and was crying when he was arrested. He has been in jail since the day of his arrest.

Mr. Gardner said that he pleaded not guilty on September 5, 1973 and that it was his attorney's idea that he undergo this psychiatric examination.

PREVIOUS ARRESTS: In the early 1950's he was arrested for driving while intoxicated and reckless driving in St. Augustine. He spent 23 days in jail and had his driver's license suspended for 1 year. In 1953 in Memphis, Tennessee he was picked up as part of an investigation but was released. In 1960 or 61 he was arrested for aggravated assault in Bowkey, Florida. His first wife brought the charges but then the charges were dismissed. In 1968 he was arrested on an attempted murder charge in Citrus County but these charges were also dismissed. In 1969 or 70 he was arrested on an assault charge filed by his wife but she

dropped the charges after he had spent two hours in jail. In 1971 his wife again had him arrested on an assault charge but these charges were also dropped.

PERSONAL HISTORY: Mr. Gardner said that he was born in Homossassa on February 9, 1934. His mother is 60 years old and his father died at age 36 in 1934 before Mr. Gardner was born. His father died with pneumonia. He is the third of 3 children born to that couple. His sister died in 1958 at the age of 26 years of cirrhosis of the liver secondary to alcoholism. He has one brother age 44 years old. Mr. Gardner said that his mother remarried when he was 6 months old and that his stepfather and mother separated in 1946 when he was 12 years old for 1 year. They then got back together again and are still married. His stepfather is 61 years old and in fair health. He has two half-brothers.

He said that he never felt close to his family and thinks that this was due to the presence of a stepfather whom he and his brother could not stand. He described his stepfather as a sadist when they were little and said that he was very strict with the boys and would beat them severely. He said that he had always been able to get along well with his mother.

He quit 7th grade in school at the age of 15 years. He said he had failed 7th grade twice when he lost interest in school and was feeling ready to go on his own. He denied ever being suspended or expelled from school and says that he got along well with the teachers and the other students.

Between the ages of 12 and 15 years he lived in the Boy's Home in Jacksonville. He said his parents put him there because they could not afford to keep him after the parents separated. He does not recall this as a particularly bad time and thinks it may have been the only good part of his life. He was discharged from the Boy's Home to his mother and stepfather at the age of 15.

He then went to work for a newspaper in Jacksonville and then as a commercial fisherman in Clearwater until the age of 17 years. He then joined the National Guard and then joined the Air Force in 1952 at the age of 18 years. He was discharged at the age of 22 years in September, 1956. He said that he attained the rank of Buck Sergeant but lost

a stripe overseas and another stripe in Orlando for unrelated reasons. He was discharged under honorable conditions.

After his discharge he worked as a commercial fisherman until 1967 in the Bradenton-Palmetto area. In 1967 and 1968 he worked as a guide at Homossassa and then in 1968 worked in construction work as a carpenter. He has worked as a union carpenter since that time.

His first marriage was in 1958 when he was 24 years old and his wife was 21. The marriage lasted for 7 years and there were no children from that marriage. The last 3 years of the first marriage were marked with many disagreements and arguments and he left his wife after seven years. He married his second wife and last wife in 1966 when he was 33 years old and she was 21 years old. The couple have 4 children ages 5, 4, 3 and 7 months. Mr. Gardner said that his marriage was wonderful and that he and his wife seldom argued until March, 1973 where his mother-in-law moved next door to them. He described his mother-in-law as alcoholic and that things in the marriage started to go bad from that time on. Approximately 3 weeks before the time of the alleged crime his wife and a stepbrother went out partying until 4:00 a.m. and he suspected that she had had sexual relations with him. He left her the next morning but returned after a few hours and talked it out and agreed to go on together for the children's sake.

HEALTH HISTORY: Mr. Gardner denied any operations and any serious illnesses. In 1953 he had a broken collar bone subsequent to a car wreck while drinking and at which time he was knocked unconscious only briefly. At age 14 years he had his right shoulder broken when he fell out of a tree. At age 13 years he fell 8 feet onto his head and said that he "acted crazy and out of his mind for 3 days" but was not hospitalized and did not see a doctor.

He was unconscious one other time in 1957 when he was knocked out in a fight for 10 minutes at which time he had some broken facial bones but he was not hospitalized and received no medical treatment for that either. He denied any venereal disease or any epilepsy. He denied any suicidal attempts and stated that he had never had any

psychiatric treatment or psychiatric hospitalizations. He said that one year prior to this examination after some heavy drinking he thought he saw a snake in a tree but it just turned out to be moss. He denied any other hallucinations or illusions. He did say that he had felt the need for therapy for the past 4 to 5 years because of nervousness, bad memory, and easy to anger on the job.

Concerning illegal drug use he said that he had only smoked marijuana twice and denied the use of any other drugs. He started drinking alcohol when he was 16 years old and began to drink regularly and heavily every weekend from a six-pack to a case of beer. In 1956 after his discharge from the service he began to drink heavier and for 1 year drank daily either whiskey, beer or wine. His drinking in the last 4 years has been that he gets drunk each time he went out on beer and whiskey. The frequency of this was usually every weekend. He denied having delirium tremens but thinks he has had the alcoholic shakes many times. Beginning in the past year he said that his drinking increased and that he would drink if it were there whether he really wanted it or not. He started going on 2 to 3 day drunks which were interrupted by 1 to 2 week dry spells. He would usually drink with friends while they rode around in cars. He felt that his drinking had affected his memory in the past 4 years. He reported that his sister was alcoholic, that his natural father was a heavy drinker and that his youngest half-brother was also a heavy drinker. He has never had Antabuse treatment for his alcoholism.

MENTAL STATUS: Mr. Gardner is a man who appears his stated age. He shows a full range of affects throughout the interview. He is oriented to place, person and situation and is oriented to date, day and year but says that it is October instead of November. His recent memory as tested on this examination was good and his remote memory was moderately impaired. His general fund of information would place him in the average range of intellectual abilities. He was able to do mental calculations and mental problems moderately well. He was able to abstract 5 proverbs presented to him and there was no bizarreness in the interpretations. When presented with 3 problematical social

situations in which he might find himself he was able to provide appropriate solutions which indicated an adequate degree of intellectual social judgment. There were no evidences of hallucinations or delusions during the examination and no evidence of a thinking disorder, particularly, no loosening of associations. No bizarre behaviors nor mannerisms were noted. His draw-a-person test showed a figure that was well formed and executed. He does not demonstrate any undue anxiety but he does show evidence of a clinical depression. He stated that he feels "a terrible depression" which has interfered with his sleep and which makes him jittery and nervous. He has not been able to cry although he believes that he has grieved the death of his wife although to him it does not seem possible. He does not think that he could have killed his wife even if he were drunk at the time and thinks that she may have bled to death from an injury to her liver when she fell on that night. He feels a need for medications for his nerves and for his depression.

SUMMARY AND CONCLUSIONS: Mr. Gardner is a 39 year old, white, widowed man who is charged with first degree murder. On psychiatric examination there is no indication of psychosis and it is my medical opinion that he is competent at the present time and able to assist his attorney in the preparation of his own defense. Further, it is also my medical opinion that had he not been under the influence of alcohol he would have been competent at the time of the alleged crime, knowing right from wrong and capable of adhereing to the right. Mr. Gardner is at the present time clinically depressed and I would recommend anti-depressant medication. Because of his history of alcoholism I would recommend that he be provided with treatment for his alcoholism on an outpatient basis once he is released.

Frank Carrera, III, M.D.

[Trial Transcript, *State of Florida v. Daniel Wilbur Gardner*, before Hon. John W. Booth, Circuit Judge, at Inverness Citrus County, Florida, beginning January 7, 1974.]

MR. OLDHAM [State Attorney]: Let the record reflect that the State has made full disclosure to counsel for the defendant in this particular case without formal order of the Court, freely and voluntarily, they have deposed the witnesses and examined the State's evidence, this is stated in the record since no motions were filed, but it was done freely and voluntarily by stipulation of counsel.

[II-6—II-156: Jury selection.]

THE COURT: Mr. Fitzpatrick, would you and Mr. Oldham come up, please?

(WHEREUPON, at the bench, Mr. Fitzpatrick requested that the paragraph on page 5 of the instructions with regard to the defendant not testifying be given by the Court)

WHEREUPON, discussion at the bench ended.

MR. FITZPATRICK: The defense request the rule be invoked, your Honor.

MR. OLDHAM: List of possible witnesses, your Honor, for the State: Lloyd Shelton, Walter Owezarak, Glenda Mae Denny, Beulah Ogle, Kelvin Melvin, Alvin Loenecker, David Merkerson, Mary Merkerson, Mary Frances Elliot, David Chancey, Richard Binaker, Herb Williams, Susan Merkerson, Joe Berhnam, George Hanstein, Nellie Merkerson, Bob Teese, Evelyn Merkerson,—Bob Teese took some photographs, and he is on call, your Honor—Travis Smith, and Dr. Shutze—he is a pathologist, he is on call, your Honor, I will be responsible for them being under the rule.

THE COURT: Does the defense have any witnesses?

MR. KOVACH: Wayne Richie, your Honor. I don't believe he is in the court room, your Honor.

THE COURT: You will be responsible for Wayne Richie?

MR. FITZPATRICK: He is on the State's list, your Honor

THE COURT: All right. The rule has been invoked—this means all of you will have to leave the court room, except the particular witness who is testifying, you cannot discuss the case among yourselves or with anyone else, or discuss the proceedings that take place during this trial except with the attorneys of record, Mr. Oldham, Mr. Green, Mr. Fitzpatrick or Mr. Kovach. All of you understand this? You will all leave at this time.

WHEREUPON, all witnesses departed from the court room.

THE COURT: Mr. Oldham, would you and Mr. Fitzpatrick come up please?

(AT THE BENCH: Let the record reflect that the court

order the court room cleared of all spectators. The preliminary instructions will be given, upon giving the preliminary instructions, the spectators will be permitted to return after they have been searched. This is with the consent of the state and the defense attorney. [)]

WHEREUPON that ended the conference at the bench.

WHEREUPON, the court room was cleared of all spectators.

WHEREUPON, the jury was brought into the court room and seated in the jury box.

THE COURT: Ladies and gentlemen of the jury, you have been selected and sworn as a jury to try the case of the State of Florida vs. Daniel Wilber Gardner. The defendant is charged by an indictment filed in this court on August 22, 1973, charging him with murder in the first degree. The elements of this offense will be explained to you later. It is your solemn responsibility to determine the guilt or innocence of this defendant, and your verdict must be based solely on the evidence as it is presented to you during this trial, and the law on which the court instructs you at the close of the trial. The jury is concerned with the facts, the court is concerned with the law. The court is concerned with the facts only to see that they are properly and lawfully presented to the jury. The jury is concerned with the law only as the court instructs them on the law at the close of the trial. Thus the province of the jury and the province of the court are well defined in [that] they do not overlap. This is one of the fundamental principles of our system of justice. Before proceeding further it is necessary that you understand how a trial is conducted. First the attorneys will have an opportunity to make their opening statements. The opening statements are not evidence, but they are to be considered only as a guide so that you may better understand and evaluate the evidence as it comes to you. Following the opening statements, witnesses will be called to testify. They will be placed under oath and then examined and cross examined by the attorneys. Documents and other tangible exhibits may also be produced as evidence. When the evidence is completed the attorneys will argue the merits of the case. What the attorneys say is not evidence.

Their arguments are persusaive [sic] only and their arguments may be accepted or rejected in whole or in part as you see fit. These arguments are given for the purpose of assisting you in evaluating the evidence, and arriving at correct decision concerning the facts. Following the arguments of the attorneys, the court will instruct you on the law that you are to apply to this case. After the instructions are given the alternate jurors will be released and you will then retire to consider your verdict. Throughout the trial you should remain alert and listen attentively—you should remember all the evidence as clearly as possible but you should not form any definite or fixed opinion on the merits of the case until you have heard all the evidence, the arguments of the attorneys, and the instructions on the law by the court. Until that time you should not even discuss the case among yourselves. In the course of the trial, the court will from time to time take recess. During these recesses you will not discuss the case with anyone nor permit anyone to say anything to you in your presence about the case. If anyone attempts to say anything to you, or in your presence about the case, tell them that you are on the jury trying the case and ask them to stop. If they persist, leave at once and report the matter to me upon your return to court. Such conduct on their part would be contempt of court to be punished as such. You are instructed not to visit the scene of the alleged crime. Should it be necessary for you to view the scene, you will be taken there as a group under the supervision of the court. You are instructed not to read, listen to nor watch any news reports of this trial. The evidence comes to you only in the court room and it must be considered by you free from any outside influence. News reports are not limited to the evidence and may contain material which is of no concern whatsoever to you which might tend to influence you one way or the other. The case must be tried solely upon the evidence produced in the court and in the presence of all the jurors, The defendant, the attorneys, and the Court. The indictment is not evidence. It is merely the means whereby the State charges a crime and it carries no inference of guilt whatsoever. The evidence is the testimony of the witnesses and the docu-

ments and other tangible things which may be produced and admitted into evidence. Now the defendant may or he may not testify during the trial. At no time is a defendant in a criminal case required to prove his innocence, or furnish any evidence whatsoever—this right is guaranteed to all defendants by the constitution and no other right is more thoroughly engrained in our system of justice. The decision to testify or not to testify is his alone to make, and the jury cannot draw any inference of guilt whatsoever from the failure of the defendant to take the witness stand on his own defense. The attorneys are trained in the rules of evidence and trial procedure, and they are obligated and in fact, it is their duty to make all objections that they feel are proper and necessary concerning the evidence and the conduct of the trial. When an objection is made you should not speculate on the reason why it is made. Likewise when an objection is sustained, you must not speculate on what might have occurred had the objection not been sustained, nor what the witness might have said had he been permitted to answer.

THE COURT: Mr. Bailiff, would you step to the rear and let [in] the spectators?

(Whereupon, spectators were searched and permitted to return to the court room)

MR. OLDHAM: Ladies and gentlemen, as the court told you, at this time it is proper for myself and Mr. Fitzpatrick to make opening arguments to you. Actually it is not an argument but basically what we think the evidence will show from the witness box, from our respective sides in the case. If I should say anything to you that does not come from the witness box, you take what came from the witness box rather than what I say. I think that the evidence will show that this defendant was married to Bertha Mae Gardner, they were both of the white race, that her approximate age was twenty-six, and she was five feet and weight ninety pounds. I think the evidence will show the defendant was about six feet and weighed a hundred and eighty pounds. I think the evidence will show that on the night in question which was a Friday night, June the 29th, going into the 30th of June, this defendant and his wife had been out, the

children were with a neighbor, they arrived back home about 11:30 or 11:45 that particular night. That they lived in Homosassa, Florida, and when they arrived home, the deceased's mother lived next door, and at the deceased's mother's house she was entertaining a male friend that they had been drinking some beer, that not too long after the defendant and his wife arrived home, they noticed that the defendant came to the mother in law's house, he was dragging his wife by the hair and beating her, he knocked the door down, came in and struck his mother-in-law and knocked her out, that the other gentleman that was there with her heard him say he was going back home and beat his wife up. We think the evidence will show that impartial neighbors in the general area heard this woman scream that night and begged him not to beat her any more, that early the next morning he went over to his mother-in-law's house and told her that she had better get over to see her daughter, that she wasn't breathing right, he told his mother when she arrived at the house that he had beat his wife because she wouldn't tell him where the children were. I think that when the ambulance driver got there and officers that this woman was lying on the bed, that her hair was in various places throughout the house where it had been pulled out, that the ambulance driver when he saw her asked where her wig was, he thought she didn't have any hair, that the defendant then got into the police car with the officers and his wife was taken to Leesburg for a pathology report, that at that time the officers took the clothes of the deceased, picked up certain samples of her hair, took the bed sheets, took the clothes of the defendant, I think expert testimony will show that her blood type was on all of these things. I think that it will further show that she had no . . . [clothes] on, when they arrived there, certain of her clothes were badly torn and so forth, one of the items found there was a whiskey bottle that had blood on it. I think the pathologist will testify that this woman was probably beaten worse than any he had ever seen, that she had multiple contusions of the scalp, face, chest, abdomen, and back. She had multiple lacerations on the skin of her face, and as I said, most of her hair was pulled out. He will

also testify that her pubic bone, that an object, a large object, had been forced or rammed into the private parts of her body, and that naturally fractured the liver, that there were also numerous hemmorages on the mouth and other bruises and marks on her I think that based upon that this defendant was arrested and charged with the premeditated killing of his wife. I think those are basically the facts that you will hear. Thank you.

MR. FITZPATRICK: May it please the court, and ladies and gentlemen of the jury, at this time, defense waives opening statement.

MR. OLDHAM: At this time, your Honor, I would like to mark certain things for identification purposes only. Could we ask Mr. Smith to come in, who has had custody of the things that went to the laboratory. Mr. Charlie Smith. I would like to mark this State Exhibit Number 1 for identification; this is State Exhibit Number 2 for identification;

THE COURT: Mr. Bailiff, escort the jury to the jury room while these exhibits are being marked.

WHEREUPON, the jury was escorted to the jury room.

MR. OLDHAM: These are all photographs, your Honor.

WHEREUPON, State Exhibits 1 through 27 were marked by the Clerk for identification, all being photographs; State Exhibit Number 28, identification, marked by the Clerk, (Shirt); State Exhibit number 29 for identification marked by the Clerk, (shoes), State exhibit number 30, identification marked by the Clerk (whiskey bottle); State exhibit number 31 for identification marked by the Clerk (bag of victim's clothing); State exhibit number 32 for identification marked by the Clerk (Bed linens) State Exhibit number 33 marked for identification by the Clerk (hair) State Exhibit number 34 for identification marked by the Clerk (Hair); State exhibit number 35 for identification, marked by the Clerk (finger nail scrapings).

THE COURT: From this point on, no spectators will be permitted to enter or leave the court room except during recess. Now I would like to admonish the spectators that there is to be no outburst or visible displays of emotions by any of the spectators. If such an outburst or visible display does occur, you will be subject to being held in contempt of

court. All spectators, attorneys and court officials will remain seated until the court officially announces that court is in recess. Bring the jury in please.

WHEREUPON the jury was returned from the jury room and seated in the jury box in the court room.

WHEREUPON, the witness, Glenda Mae Demney was called by the state, and having been sworn, testified as follows:

DIRECT EXAMINATION BY MR. OLDHAM:

Q. Would you state your name and address to the ladies and the gentlemen of the jury, please mam?

A. Glenda Mae Demney 2915 Ivy Street, Tampa, Florida.

Q. And where did you live on the 29th and 30th day of June, 1973?

A. Homosassa, Florida, Mason Creek Road.

Q. How long had you been living there, mam?

A. Little over a year, I guess.

Q. What relation to you was Bertha Mae Gardner?

A. She was my daughter.

Q. And, do you know the defendant in this cause?

A. Yes, I do.

Q. What relation to you was he, mam?

A. Son-in-law.

Q. And that is Daniel Wilber Gardner?

A. Yes, sir.

Q. Where did you live in relation to where they lived on the 29th and 30th of June, 1973?

A. Right beside them in another trailer.

Q. They lived in a trailer?

A. Yes.

Q. And you lived in a trailer?

A. Yes.

Q. And was their trailer and your trailer located in Citrus County, Florida?

A. Yes, sir.

Q. Did you have occasion to see your daughter on the evening of the 29th day of June, 1973?

A. Yes.
Q. What was the size of your daughter?
A. You mean how big was she?
Q. How tall was she, about how much did she weigh?
A. Well, I would say she was about Five-one, maybe the most she would weight a Hundred and One pounds, maybe not that much. Usually it was ninety-eight pounds.
Q. Now, you say that you did see her on the 29th?
A. Yes, sir.
Q. Did you see her in the afternoon, evening, or what?
A. In the evening.
Q. About what time?
A. I would say around Seven o'clock, Six-thirty or Seven.
Q. Where did you see her?
A. At home.
Q. Did you see him at that time?
A. No, sir.
Q. When you saw her at home, did you and she go any where?
A. Not right then, no, sir.
Q. Later on, did you go somewhere?
A. Yes, sir.
Q. About what time did you go?
A. Well, it was after dark—I didn't look at the clock, so I couldn't tell you exactly what time it was.
Q. Where did you go?
A. Went to my youngest son's.
Q. Did anybody go with you and your daughter?
A. Yes, sir.
Q. Who?
A. Mary Elliton.
Q. Who is Mary Elliton?
A. She is my ex sister-in-law, my daughter's aunt.
Q. And how long did you stay at your son's?
A. Just long enough to drop the two children off.
Q. And then where did you go?
A. Went out to the Sugar Mill.
Q. Is the [S]ugar Mill and place where there is a bar, or a resturant, or what?

A. Yes, sir, it is a bar.
Q. Did your daughter go in the Sugar Mill?
A. We let her out, she went in the Sugar Mill.
Q. What time was that?
A. I would say around Eight, Eight-thirty. Something like that, maybe Nine.
Q. Up to that time, had you had anything to drink?
A. I had had a couple of beers.
Q. What about your daughter?
A. She had one beer with me.
Q. Now, where did you go after you let your daughter out at the Sugar Mill?
A. I went back home.
Q. Did you see him in the Sugar Mill at that time?
A. No, sir, I didn't go in the Sugar Mill.
Q. Was she looking for him?
A. Yes, sir, she was.
Q. Now, did you have occasion to see your daughter or your son-in-law any more that night or early the next morning?
A. Yes, sir.
Q. When and where did you see them?
A. My daughter came back out to my trailer, told me she was out of cigarettes.
Q. What time was this?
A. Oh, I don't know, I would say around Ten o'clock, Ten-thirty, something like that. So, I borrowed some money off a friend of mine, I guess she went up to the Jiffy, I guess she got herself a pack of cigarettes and got me a pack. She come back out to the trailer . . .
Q. You are talking about your trailer?
A. My trailer. And I asked her where she was going and she said she was going to look for her husband.
Q. This was about Ten or Ten-thirty, you say?
A. Yes.
Q. Did she have anything to drink in your presence at that time?
A. Not as I know of.
Q. Who was with you at the trailer, now?
A. Buckshot.

Q. What is his name?
A. Calvin Loenacker, is all I know—
Q. This is a male friend?
A. Male.
Q. Now, did you see your daughter or your son-in-law any more that night?
A. Yes, sir.
Q. Tell the ladies and gentlemen what you say, if anything?
A. Well, I don't know exactly what time it was, but after my daughter left, I told her to be careful, she said she would, she said she was going to go look for him and bring him home. I sat there at my kitchen table, Buckshot too . . . I had just fixed my lunch, had it ready for the next morning, sat there sipping on a beer, and all of a sudden here comes the door, hinges and all in. And my son-in-law was behind it. He broke down the door, hit me one time and out I went.
Q. Where did he hit you?
A. Hit me on the side of the face.
Q. Did he knock or anything before he came in?
A. No, sir.
Q. What kind of door was that?
A. Well, it was just a regular door, wasn't a metal door or nothing like that.
Q. Did you hear him coming up?
A. No, sir.
Q. Do you know whether your daughter was outside with him or not?
A. No, sir.
Q. Did he say anything to you before he hit you?
A. Not as I recall.
Q. He knocked you out, is that right?
A. He knocked me out.
Q. Now, you say this friend of yours named Buckshot was there at this time?
A. He was sitting right there.
Q. Do you know what he did or said after that?
A. I don't know what he said after that because I was completely unconscious.

Q. Did anyone take a photograph of you after that?
A. I don't think so. I know they was taking pictures at the trailer.
Q. I show you State Exhibit Number 14, that is not you, is it?
(Witness looks at photograph)
WITNESS (continuing)
A. Yes, that's me.
Q. I show you State Exhibit number Fifteen (15) marked for identification and ask you if you know who that is?
(Witness looks at photograph)
WITNESS (continuing)
A. That's myself too, I was in a walking cast at the time.
Q. I show you State Exhibit Number Sixteen marked for identification and ask you who that is?
(NOTE: Exhibit actually shown was number 26 and not 16)
(Witness looks at photograph)
WITNESS (continuing)
A. That's my daughter.
Q. Thank you. Now, did the defendant come to your trailer the next morning?
A. Yes, sir.
Q. About what time did he get over there?
A. Well, I usually get up around 6, 6:30 or 7:00. I was just fixing to fix some coffee and he told me to come over and check on my daughter, said my G.D. Daughter, said she wasn't breathing right. But he just didn't say G.D.
Q. He didn't say that?
A. He didn't. I better come and check on her 'cause she was not breathing right.
Q. Did you go next door?
A. Yes, sir.
Q. Did you see your daughter?
A. Yes, sir.
Q. What was her condition when you saw her?
A. Strip naked on the bed, bruises on her face—he wanted me to slap her face, call her, and I said 'I will not, I will call her but I won't slap her', and I just touched her and

told him he had better call an ambulance, I didn't know if she was unconscious or not.

Q. Did he say anything to you?

A. He didn't say nothing to me, he kept mumbling from the front door to the bed room.

Q. Did you wait for the ambulance to come?

A. Yes, sir.

Q. Could you tell whether she was alive or dead at that time?

MR. FITZPATRICK: Defendant objects, calls for conclusion.

THE COURT: Objection sustained.

MR. OLDHAM (continuing)

Q. Was the defendant drinking that morning when you saw him?

A. Not as I know of.

Q. Did he seem intoxicated to you?

A. No, he didn't.

Q. What about that night before when he came in your trailer and struck you, could you tell whether he was drinking or whether he wasn't or anything at that time?

A. He had been drinking but he was not drunk.

Q. Had you been drinking?

A. Yes, sir, I had drank about three beers.

Q. And the man that was with you, how many beers had he had?

A. He had a bottle of whiskey.

Q. The friend that was with you?

A. Yes. I asked him what on earth he was doing out there and he said he come out to talk to me, and I said 'well, I'm fixing to drink me a couple beers and go to bed'.

Q. Where do you work?

A. I'm not working anywhere now. At that time I was sitting on a vegestable [sic] stand for Edward Melcher.

Q. What time did you go to work every day?

A. Sometimes I had to go down there at Four o'clock to go with him to the Farmers Market in Tampa, sometimes it was Six-thirty, Seven.

MR. OLDHAM: You may inquire.

CROSS EXAMINATION BY MR. FITZPATRICK:

Q. Mrs. Demney, is that how you pronounce your name?

A. Yes.

Q. Mrs. Demney, I noticed that you are on crutches—how did you hurt your foot? or leg?

A. How did I hurt my foot again?

Q. Yes, mam.

A. I stepped on a rock and just twisted it the wrong way. It wasn't well.

Q. Mrs. Demney, when did you have your first beer on the date of June 29th?

A. Sir?

Q. When did you have your first beer on the date of June the 29th?

A. After I got home, after Ed Melcher had let me out.

Q. That was about Seven o'clock?

A. I would say around about Seven-thirty or Eight o'clock.

Q. You don't really know what time it was, do you, when you got home?

A. I'm not too good looking at watches or clocks unless I'm going to work.

Q. You had your first beer when you got home at Seven thirty?

A. About Seven thirty.

Q. And where did you get that beer from, [M]rs. Demney?

A. Stopped out there at the Quick-way at Homosassa Springs, bought me some cigarettes, my daughter didn't need the money that day, bought me some cigarettes and a six pack of beer.

Q. Were you driving, Mrs. Demney?

A. No, sir.

Q. Were you walking?

A. You mean when I went home?

Q. Yes.

A. No, Ed Melcher taken me home.

Q. And you had your first beer around Seven thirty or Eight o'clock?

A. Seven thirty, Eight o'clock.

Q. And I believe you testified that the next time you had a beer was when Buckshot came over to your house?

A. Yes, sir.

Q. Mrs. Demney, isn't it a matter of fact that you had a beer with your daughter before Buckshot got there?

A. I just said that she drank one beer.

Q. Was Buckshot there with you then?

A. No, Buckshot wasn't with me there then.

Q. Then that was your second beer?

A. No, after my daughter left, Buckshot come out there and I wanted to know what on earth he was doing at my trailer . . .

Q. So when your daughter was there, you had another beer, didn't you?

A. Yes.

Q. So that would be two beers, right?

A. That's right.

Q. And then Buckshot got to your house?

A. That's right.

Q. And he brought a bottle of whiskey?

A. That's right.

Q. Did you drink whiskey with him?

A. I sure didn't.

Q. Do you?

A. No, sir.

Q. You never had a drink of whiskey in your life?

A. Oh, yes, I've had a drink of whiskey in my life, but I cannot stand whiskey.

Q. Did Buckshot bring anything besides whiskey over to your house?

A. That's all he brought.

Q. How many beers did you have after Buckshot got there?

A. I would say about one.

Q. You had one, then you had three left in the refrigerator?

A. I had one and I was drinking one when the door come down.

Q. What time did the door come down?

A. I couldn't pinpoint the time, because I didn't look at my clock.

Q. Just try, Mrs. Demney.

A. I judge it was around Eleven, or Eleven-thirty when the door came down.

Q. So, Buckshot arrived around Ten o'clock I think you said?

A. He arrived shortly after my daughter dropped off at the Sugar Mill.

Q. And between that time and Eleven thirty, or whatever time you say it was, you had one more beer?

A. That's right.

Q. How much did Buckshot have to drink?

A. I couldn't say how much he had to drink, I was fixing my lunch.

Q. You wasn't particularly paying any attention to Buckshot?

A. We had conversation and that's all.

Q. Beg your pardon?

A. We had conversation and I was fixing my lunch at the same time and that's all.

Q. You said he came over there to talk to you about something, is that correct?

A. That's right.

Q. What did you all talk about?

A. I've known Buckshit, Buckshot ever since I've been a little kid.

Q. You asked him what he wanted, what did he say?

A. He said he come around to keep me company and talk to me.

Q. And the time that the door broke down that you were talking about, Buckshot was still there and he was drinking his whiskey and you were drinking your beer?

A. When that door was broke down, I was so shocked and disturbed, I don't know whether he was drinking whiskey at the time or not.

Q. I'm talking about between the time that he got there, Mrs. Demney, and the time the door broke down.

A. I guess he was drinking whiskey.

Q. But you didn't pay any attention to how much?

A. No.
Q. You were making your lunch at that time?
A. Like I say, I was making my lunch.
Q. From the time that Buckshot got there until the door come down?
A. That's right.
Q. And that was approximately an hour and a half?
A. Uh-huh.
Q. Mrs. Demney, isn't it a matter of fact, that this defendant Gardner, came to your house and knocked on the door, and you opened the door and you and he had a good fuss because he didn't know where his children were?
A. No, sir.
Q. And you slammed the door?
A. No, sir.
Q. That is not true?
A. That is not true.
Q. Isn't it a matter of fact that he then kicked the door and the door flew open and hit you and the door knocked you down?
A. No, sir.
Q. You are testifying here under oath that he came . . . .
MR. OLDHAM: Objection, your Honor, the witness has answered the question. He is arguing with the witness now.
MR. FITZPATRICK: Your Honor, I'm not saying what I was asking her, but it is not something that had been answered.
THE COURT: Well, go ahead and ask the question.
MR. FITZPATRICK (continuing)
Q. You are saying that he came in knocked the door down and knocked you out with his fist?
A. He broke down the door, hinges and all and knocked me out with his fist, and kicked me in the end of my spine, and the door didn't do that.
Q. Who fixed the door, Mrs. Demney?
A. It was not fixed when I went to the hospital, it was laying inside the trailer.
Q. Is it fixed now?
A. Yes, I guess it is, they burnt both trailers up.
Q. Who burnt them up?

A. I guess his folks.
Q. You mean those two trailers . . .
A. The trailer, and cabana, that my daughter and son-in-law lived in and the trailer I lived in, they burnt them up.
Q. Where are your four grandchildren now?
A. They are with David and Libby Merkerson.
Q. Who are they?
A. They are Wilber Gardner's half brother and half sister-in-law.
Q. Now, Mrs. Demney, isn't it a matter of fact that you and Buckshot had been sitting there drinking for some time, ...
A. No, sir.
Q. And when Mr. Gardner got there both of you were highly intoxicated and you had the fight?
A. No, sir. I didn't have no chance to fight. To defend myself either.
Q. He just broke in for no apparent reason?
A. Right.
Q. And you and he hadn't been fighting earlier in the day?
A. No, sir, I hadn't even seen him.
Q. And he lived right next door to you?
A. Yes.
Q. And he broke in and for no reason he knocked you out?
A. That's right.
MR. FITZPATRICK: Thank you, Mrs. Demney.
MR. OLDHAM: No further questions, you may step down.
WHEREUPON, the witness, GLENDA MAY DEMNEY was excused from the witness stand.
WHEREUPON, the witness, ALVA LOENECKER was called by the State and having been sworn, testified as follows:
DIRECT EXAMINATION BY MR. OLDHAM:
Q. Would you state your full name and address for the ladies and gentlemen of the jury?
A. Alva Loenecker, General Delivery, Homosassa, Florida.
Q. What is your profession or occupation?

A. I'm a commercial fisherman.
Q. How long have you been a commercial fisherman over there?
A. I guess about thirty-five, forty years.
Q. Do you know the defendant in this case, Daniel Wilber Gardner?
A. Yes, sir, as good a friend as I ever had.
Q. How long have you known him?
A. Ever since he was a kid.
Q. What about his wife, now deceased?
A. I knowed her.
Q. How long had you known her?
A. Ever since she was born.
Q. And, did you know her mother too?
A. Yes, sir.
Q. Did you have occasion to be at her mother's house on the 29th day of June, 1973?
A. Yes, sir.
Q. About what time did you get there, sir?
A. I imagine I got there about Seven thirty.
Q. Was her mother there?
A. Yes, sir.
Q. How long did you stay there?
A. Well, I was there when Mr. Gardner come back.
Q. About what time was that?
A. Around Eleven or Eleven-thirty.
Q. And were you drinking anything?
A. Yes, sir, me and Mrs. Demney had a drink there.
Q. What were you drinking?
A. We had a drink of whiskey.
Q. Did she drink whiskey too?
A. Yes, sir.
Q. What happened, then, about Eleven or Eleven thirty?
A. Mr. Gardner come, drug the door off the trailer. He come in and hit Glenda Mae and knocked her out on the floor, and I asked him not to do that no more.
Q. O.K., what did he do then?
A. Said he was going back and beat hell out of his wife, and I said 'please don't do that Bill'.
Q. Do you know whether he did or not?

A. No, sir, I do not.
Q. Did you see him?
A. No, sir.
Q. Did you see her?
A. I seen her, she was at the door at the trailer, and he put her down like that there and went to pulling her head, and she said 'please don't hit me no more', it could have been her that said it, now, or could have been the T.V. was playing loud.
Q. She was outside the trailer when he . . .
A. She was standing on the step, the trailer there, and the light was shining out.
Q. O.K. You say you have known her since she was born too?
A. Yes, sir.
Q. Did you say he caught her by the hair?
A. They was in the door, like that—
Q. Did you see him or her any more?
A. No, sir, not 'til the next morning. I saw him, he come back. I went in and got Glenda Mae up and set her on the bed and washed her face. And he come back. And he said he wanted to jump on Glenda Mae again and I said 'no', and he said 'this was his trailer', and I said 'Glenda Mae is buying the trailer', and he said 'no, it's mine', and I said 'well, I'll go home', so I went back in the trailer and he went on back to his house.
Q. How long was it after he had been over there the first time was it until he come back?
A. I guess maybe thirty, thirty-five minutes.
Q. Did he tell you why he wanted to beat this woman up?
A. No, sir.
Q. Did he tell you why he was going to beat his wife up?
A. No, sir.
Q. But, he didn't attack you or anything like that?
A. No, sir. Just said 'Bill you done wrong', and he said 'yeah, I believe I have', because me and him been good friends.
Q. Now, when did he say this?
A. Right there at the door of the trailer, I was standing at the door and he was outside the trailer.

Q. Was this on the second occasion?
A. Yes, sir.
Q. Said he thought he had done wrong?
A. Yes, sir, by hitting Glenda Mae.
Q. Huh?
A. Bout hitting Glenda Mae.
Q. But he didn't bother her the second time?
A. No, sir.
Q. Did she say anything or do anything to him that would require him to hit her?
A. No, sir, I couldn't tell you.
Q. Were you intoxicated?
A. No, sir.
Q. Did you have occasion to go over to his trailer where he and his wife lived the next morning?
A. He come to the trailer and called me, said something was wrong with his wife.
Q. Did you stay at her trailer all night?
A. Yes, sir, I made a pallet there on account of Glenda Mae's face all skint up.
Q. Skint up where he hit her?
A. Yes, sir.
Q. So he came over the next morning,
A. Yes, sir.
Q. And . . .
A. He said something has happened to my wife, that I can't get her awake, looks like she has took some dope.
Q. And did you go over there?
A. Yes, sir, Glenda Mae got up and come on out the trailer, and I kind of helped her down the steps, and he went in first, and I helped Glenda Mae back into his house, and I come on behind her.
Q. Did you see his wife when you got over there?
A. Yes, sir, I seen her, he had her up in his arm and her head over here, and that's all I could see. And he said 'I can't understand why my wife won't wake up, looks like she's'—said 'have I killed her or is she dead', and I said 'she looks like she is dead', and he asked me to go call the ambulance, and then I went and got his mother.
Q. You went and got his mother?

A. Yes, sir, went and called her.
Q. I show you State exhibit number Twenty Six (26) marked for identification.
(Witness looks at photograph)
A. Yes, sir.
Q. What?
A. Shows her there naked.
Q. Who?
A. Glenda Mae—I mean Bill Gardner's wife.
Q. Is that how she looked when you went over there that morning?
A. No, sir.
Q. How did she look when you went over there?
A. Like I say, Glenda Mae was in front of me, and like she was on this side and I was on this side and all I could see was her head.
MR. OLDHAM: You may inquire.

CROSS EXAMINATION BY MR. FITZPATRICK:

Q. Buckshot, have you ever seen that picture before?
A. No, sir.
Q. Let me try to get something straight in my mind—you were at Glenda Mae's the morning after the door was busted in, right?
A. Yes, sir.
Q. What time was that?
A. I imagine it was around Seven o'clock when he called me.
Q. Had you been home?
A. No, sir.
Q. You stayed there all night?
A. Yes, sir.
Q. Your last name is Loenecker?
A. Yes, sir.
Q. Buckshot, you came to Glenda Mae's house about Seven thirty in the evening, is that right?
A. Yes, sir.
Q. You and she was just sitting around talking, one thing and another—

A. Yes, sir, and listened to the Grand Old Opry on the radio.

Q. Pretty good program to listen to?

A. Yes, sir.

Q. Did she have any beer while you were there?

A. Well, Glenda Mae—I give Glenda Mae three dollars and Mr. Gardner's wife went down and bought six pack of beer.

Q. That was after you were there?

A. But I didn't drink none of the beer.

Q. You saw Bertha drink a beer?

A. Yes, sir.

Q. And you gave Glenda Mae some drinks?

A. Bertha Mae brought it in and set it on the table.

Q. You mean the jug of liquor?

A. No, sir, the beer.

Q. The beer. What kind of whiskey did you bring over?

A. I brought some Ten High.

Q. A fifth of Ten High?

A. No, sir.

Q. Pint?

A. Pint.

Q. So between Seven thirty and Eleven thirty, you and Glenda Mae just sat around and drank Ten High and . . .

A. No, we did not drink all of it, we only had two drinks.

Q. She had two?

A. Yes, sir.

Q. Was any of the beer missing when the door crashed in? Did she drink any of the beer?

A. She drank one.

Q. She drank one beer?

A. Yes, sir.

Q. And you had two drinks of whiskey?

A. Yes, sir.

Q. Now, you say he came over the first time—what did he say when he came over the first time?

A. Never said anything, just jerked the door down.

Q. He jerked the door down?

A. Yes, sir. Just jerked the door down and come in.

Q. The door sort of flew open on the hinges?

A. Well, the door, was kinda' like that door over there, made out of plywood—

Q. It just flew open on the hinges?

A. No, it come on off.

Q. It came off of the hinges?

A. Yes, sir.

Q. He give it a pretty good lick then, didn't he?

A. It come on the outside.

Q. Oh, he had to pull it?

A. Yes, sir.

Q. He didn't kick it down?

A. No, sir.

Q. But then he went on back home after he beat up on Glenda Mae?

A. Yes, sir.

Q. He didn't say why he was over there, did he?

A. No, sir.

Q. Just broke the door down, for no apparent reason, and beat up on her?

A. Yes, sir.

Q. And when he came back the second time, you said he said he was going to beat up on Glenda Mae some more?

A. Yes, sir.

Q. What did she say to him?

A. Didn't say nothing, she was in the bed.

Q. Was she asleep?

A. No, sir,—he had hit her pretty hard.

Q. And he came back about thirty minutes later?

A. Thirty, thirty-five minutes later.

Q. What did Glenda Mae get up that night?

A. Glenda Mae didn't get up.

Q. When you went to bed, where was she?

A. She was back there in the trailer, and I went up there and laid down in the other room there.

Q. And you don't remember anything until the next morning?

A. No, sir, not until he called me.

MR. FITZPATRICK: That's all.

MR. OLDHAM: No further questions of this witness.

WHEREUPON, the witness was excused from the wit-

ness stand. WHEREUPON, the witness, NELLIE MERKERSON was called by the State and having been sworn, testified as follows:

DIRECT EXAMINATION BY MR. OLDHAM:

Q. Would you state your name and address for the ladies and gentlemen of the jury?

A. My name is Nellie Merkerson, my address is Rte. 1, Box 35, Homosassa, Florida.

Q. What relation is the defendant to you?

A. I am the mother of the defendant.

Q. Did you happen to go over to his trailer on the morning of the 30th day of June, 1973, where he and his wife were living?

A. I did.

Q. And prior to going over there, did you see this fellow called 'Buckshot', or whatever his name is?

A. I did.

Q. Did he come to your house?

A. Yes.

Q. For what purpose did Buckshot come to your house?

A. He said that . . .

MR. FITZPATRICK: To which the defendant objects, hearsay.

MR. OLDHAM: I will withdraw the question.

MR. OLDHAM (continuing)

Q. He did come to your house, is that right?

A. Yes, sir.

Q. As a result of his coming to your house what did you do?

A. I went over there.

Q. Went over to your son and daughter-in-law's house?

A. Yes, sir.

Q. About what time would you say you got there?

A. I don't remember exactly, around Seven o'clock.

Q. Did you see your son there?

A. Yes, I did.

Q. Did you say anything to him or did he say anything to you?

A. Yes. I went in and I said 'Dan, what have you done?', and he says 'I haven't done anything', he says 'I want somebody to get some help', and that's all.

Q. That is all he said?

A. That is all he said at this time.

Q. Do you recall writing a statement in . . .

A. I do.

Q. And swearing to it on the 2nd day of August, 1973?

A. I do.

Q. And do you know what you said in that statement?

A. I went back to the house after this, and I was so upset, I couldn't find the phone number, so I called my daughter-in-law, and asked her to call the ambulance.

Q. I'm talking about what you said to your son and he said to you when you went over there about Seven o'clock on the 30th—

A. That's about all that was said there then.

Q. Then you didn't say in this statement—'I went over to Daniel Gardner's and saw what happened and said my God, Danny, what have you done, and he said mom she wouldn't tell me where my babies are and I tried to get her to tell me and she wouldn't so I kept on beating her, she never would tell me where my babies' . . . . . .

A. I was trying to tell you—I went back to the house, and I made this phone call, and I went back over there,—I tried to explain this the other day when you were asking me questions—

Q. You are talking about Mr. Green was asking you questions?

A. Yes.

Q. All right, go ahead.

A. When I went back over there, then is when he was sitting on the couch, and he was crying, and then is when I made this other statement.

Q. What did he say when you went back and he was crying?

A. That is when he said that he guessed he kept on beating her because she wouldn't tell him where the babies were.

Q. Did you see her when you went over there on either occasion?

A. Yes, I did.
Q. Where was she?
A. On the bed.
Q. Would you tell me how she was clothed?
A. She had a sheet over her, over her body—
Q. Did you see any bruises or wounds on her?
A. On her face.
Q. Now, was his half brother over there too?
A. Not at the time.
Q. Were you there at any time when David Merkerson was there?
A. Yes.
Q. Did you hear what he told his half brother that morning?
A. No, I didn't.
MR. OLDHAM: You may inquire.
MR. FITZPATRICK: I have no questions.
WHEREUPON, the witness was excused from the witness stand.
WHEREUPON, the witness DAVID MERKERSON was called by the State and having been sworn, testified as follows:

DIRECT EXAMINATION BY MR. OLDHAM:

Q. Would you state your full name and address to the lady and gentlemen of the jury please?
A. David Merkerson, Rt. 1, Box 35, Homosassa, Florida.
Q. And, you are related to the defendant in this cause, Mr. Merkerson?
A. Yes, I am.
Q. What relation is that?
A. He is my brother,—
Q. Is he a full brother?
A. Half brother.
Q. All right, he is your half brother, is that right?
A. Yes, sir.
Q. Now, on the 29th and 30th day of June, 1973, how far did you live from your half brother, do you recall?
A. About a hundred and fifty foot.

Q. Did you live in a house, or trailer or what?
A. House.
Q. And he lived with his wife and children in a trailer?
A. Yes, sir.
Q. Now, did you have occasion to go to your half brother's house and Bertha Mae Gardner, his wife's house, on the morning of the 30th?
A. Yes, sir.
Q. Did you see your brother?
A. Yes.
Q. Where was he when you saw him?
A. Standing in the door way of the trailer.
Q. Was there anybody else there?
A. Yes, sir.
Q. Who was there?
A. My mother, my wife, Bertha's mother,—Buckshot—he wasn't in the house, he was outside.
Q. Did you say anything to your brother at that time or did he say anything to you?
A. Not at that time, no, sir.
Q. Did you see your sister-in-law in the house?
A. Yes, I did.
Q. Can you describe where she was and what her condition was?
A. She was on the bed, she was dead.
Q. I show you state exhibit number 26 marked for identification and ask if you know what it depicts or shows?
(WITNESS looks at photograph, marked twenty-six, (26) for identification)
WITNESS (continuing)
A. Yes, sir.
Q. What does it depict or show?
A. That's Bertha.
Q. Is that the way she looked when you were there?
A. No, had the sheet over her—and the thing she's laying on was not there, she was on the bed—
Q. There was a sheet half way over her?
A. It was all the way to the neck.
Q. Did you see any bruises or wounds on her face?
A. Discoloration, but I couldn't tell.

Q. Did you hear anything in the night over at your half brother's house, the night of the 29th or the early morning of the 30th?

A. Yes, sir.

Q. What did you hear?

A. Just his voice talking, is all I heard.

Q. Did you hear any noises of any kind?

A. No, sir, I didn't.

Q. Did you hear her voice?

A. No, sir.

Q. Was his voice loud or not?

A. No, sir.

Q. About what time was that?

A. I can't say for sure on the time. I had already been to bed and woke up.

Q. Did you see the defendant when they put him in the patrol car?

A. Yes, sir.

Q. Did he say anything to you or did you say anything to him?

A. Yes, sir.

Q. What was said?

A. He said 'Dave, I guess I really did it this time', and I said 'yes, I guess you did'.

Q. He said 'Dave, I guess I really did it this time'?

A. Yes, sir.

Q. And you said 'yes you did'?

A. Yes.

Q. That is when they took him off?

A. Yes, it was a few minutes after that they took him.

MR. OLDHAM: You may inquire.

MR. FITZPATRICK: No questions.

WHEREUPON,the witness was excused from the witness stand.

THE COURT: We will take a recess at this time.

WHEREUPON, the jury was escorted to the jury room.

WHEREUPON, the spectators were escorted from the court room.

WHEREUPON, the defendant was escorted to the holding room.

THE COURT: Court will be in recess for ten minutes.

WHEREUPON, court was in session after ten minute recess, Spectators returned to the court room, defendant in court room.

THE COURT: Bring the jury in.

WHEREUPON, the jury was returned to the court room and seated in the jury box.

WHEREUPON, the witness, SUSAN MERKERSON was called by the State and having been sworn, testified as follows:

DIRECT EXAMINATION BY MR. OLDHAM:

Q. State your full name and address, please mam?

A. Susan Merkerson, Homosassa, Florida.

Q. And, are you related to the defendant in this cause?

A. My nephew.

Q. Did you know his former wife, Bertha Mae Gardner?

A. Yes, sir.

Q. How far did you live from where they lived?

A. Less than a half block, across the road.

Q. You lived across the road from them?

A. Yes, sir.

Q. Did you live there on the 29th and 30th of June, 1973?

A. Yes, sir.

Q. Did you have occasion to go over to his and his wife's house on the 30th day of June, 1973? The next morning?

A. No, sir.

Q. Did you hear anything the night of the 29th or early morning of the 30th over at their house? Any noise, or anything?

A. Well, about Eleven thirty I heard some bumping, moving furniture, woke me up.

Q. It woke you up?

A. Yes, it woke me up, Eleven thirty, I had done gone to bed, and it sounded like somebody was moving furniture.

Q. Did it come from his house?

A. Yes, sir.

Q. But you didn't go over there the next morning to see what happened?

A. No, sir.

MR. OLDHAM: No further questions.

MR. FITZPATRICK: No questions.

WHEREUPON, the witness was excused from the witness stand.

WHEREUPON, the witness, WALTER OWEZAREK was called by the State and having been sworn, testified as follows:

DIRECT EXAMINATION BY MR. OLDHAM:

Q. Would you state your full name and address for the lady and gentlemen of the jury?

A. My name is Walter Owezarek, address is Route 1, Maple Avenue, Highland South, Inverness.

Q. What is your profession or occupation?

A. I'm an emergency medical technican.

Q. And were you an emergency medical technican on the morning of the 30th day of June, 1973?

A. Yes, sir.

Q. On that particular day did you have occasion to go to the residence of Daniel Wilber Gardner and Bertha Mae Gardner, his wife?

A. Yes, sir.

Q. Did you know them prior to that time?

A. No, sir.

Q. About what time did you get there?

A. Just a little before Seven o'clock.

Q. Do you know who called you?

A. No, sir.

Q. You arrived there and where was their home located at that time?

A. Old Homosassa, a trailer with an extension, patio of some sort.

Q. O.K. When you arrived there, did you take anyone with you? Or did you go alone?

A. I have a driver, but usually I go first, and while he

can position the ambulance in case we have to carry people out.

Q. When you got there at their home, do you recall who was there?

A. There were two females and Mr. Gardner sitting on a couch right as I went to the door.

Q. I show you State exhibit number Twenty-Six (26) marked for identification, and ask if you know what it depicts or shows?

(Witness looks at photograph)

WITNESS (continuing)

A. Yes, sir. This I didn't see immediately, this was much later, it was in another room.

Q. So you stayed in the front room with these people first, is that right?

A. No, well, I asked who was the patient because one of the women's face was all battered up, so I didn't know if that was the patient that we was summoned for, and the call originally was for an unconscious person that we received, an unconscious person.

Q. But this defendant was there, is that right?

A. Yes, sir.

Q. Did he say anything to you when you got there?

A. No—I asked where was the patient and he pointed to the room just opposite, which would have been to the left.

Q. Did you go in that room?

A. Yes, sir, I did.

Q. Did anybody go with you, or did you go alone?

A. I went alone.

Q. What did you see when you got in there?

A. I seen this woman was covered up lying on the bed and I examined her and found no vital signs.

Q. By vital, do you mean signs of life?

A. Yes, sir. There was no vital signs, and her face was battered a little, and then it dawned on me that maybe there was a fight, because a lot of her hair seemed to be missing . . .

MR. FITZPATRICK: We object to the statement made voluntarily by the witness and move the court to stirke.

THE COURT: Objection sustained, motion granted.

MR. OLDHAM (continuing)

Q. Did you uncover her and look at the rest of her body?

A. Yes, sir, I did.

Q. And what did you observe on the rest of her body?

A. That the lower part of her, the pelvic area was a gigantic hematosa, badly beaten. .

Q. You are talking about this area down in here?

A. Yes, sir.

Q. Does she look there (referring to photograph) the same as she did when you went into the room and saw her that morning?

A. She was covered, I had to uncover her—due to our training, anything suspicious we are suppose to give much more thorough examination, and that I did.

Q. And did you say anything to the defendant or did he say anything to you after you uncovered her and pulled the sheet off of her?

A. Well, when I seen that she was so badly bruised, I inquired from the defendant how did it happen,

Q. When you were in the room with Bertha Mae Gardner, deceased, did you ask the defendant anything or did he ask you anything as to what had happened?

A. Well, yes, I did, I asked—well it was my thought there had been a fight, it looked like it from the condition of the house . . .

MR. FITZPATRICK: We object to voluntary statements and conclusions on the part of this witness and move to strike it and ask the court to instruct the jury to disregard it.

THE COURT: Objection sustained, motion granted, the jury is instructed to disregard the Witness's statement about what he thought.

MR. OLDHAM (continuing)

Q. Just tell what the witness said, what the defendant said, not what anybody thought.

A. I asked Mr. Gardner if Mrs. Gardner wore a wig, and he stated that she didn't. I asked him what happened to the hair on her head, because the hair looked to me that it was all pulled out, and there was hair all over, and then I really started to look and there was clumps of hair all

over the place, and that's when my driver came in and I told him to notify the Sheriff's Department.

Q. Did you ask the defendant anything else after about the hair?

A. No, sir.

Q. Did you ask him what happened?

A. No, sir, I didn't.

Q. So, you made no inquiry to him as to what had happened?

MR. FITZPATRICK: We object to the question, it has been asked and answered twice.

THE COURT: Objection sustained.

MR. OLDHAM (continuing)

Q. Now, were you there when the law enforcement officers arrived?

A. Yes, sir, I was.

Q. And, who arrived if you know?

A. Officer Lloyd arrived first, and then Herb came and then Mr. Green.

Q. Would you state their full names?

A. I don't know full name, Lloyd from the Sheriff's Department was first.

Q. Would that be Lloyd Shelton?

A. Yes, sir.

Q. And who was next?

A. Then Herb, Deputy, came . . .

Q. And then who?

A. Then Mr. Green came.

Q. This Mr. Green here?

A. Yes, sir.

Q. Did you move or touch anything from the time you got there to the time Mr. Shelton got there?

A. Just uncover of the victim.

Q. You just uncovered the victim?

A. To examine, yes.

Q. Now, what did you do with the body of the victim? Did you leave it there?

A. When the policeman gave us permission we removed it to the hospital.

Q. What hospital did you take it to?

A. Citrus Memorial Hospital.
Q. Did you leave it there?
A. Yes, sir.
Q. You didn't take it anywhere from there?
A. No, sir.
MR. OLDHAM: You may inquire.
MR. FITZPATRICK: I have no questions.
WHEREUPON, the witness was excused from the witness stand.
WHEREUPON, the witness, LLOYD SHELTON was called by the State and having been sworn, testified as follows:

DIRECT EXAMINATION BY MR. OLDHAM:

Q. Would you state your full name, please?
A. Lloyd Shelton.
Q. And what is your address?
A. P.O. Box 554, Homosassa Springs.
Q. What is your profession or occupation?
A. Deputy Sheriff, Citrus County.
Q. How long have you been a deputy sheriff?
A. Eight and a half years.
Q. Deputy Shelton, did you have occasion to go to the residence of Daniel Wilber Gardner on the 30th day of June, 1973?
A. Yes, sir, I did.
Q. Is it located in Citrus County?
A. Yes, it is.
Q. About what time did you arrive there?
A. Four minutes after Seven, in the A.M.
Q. Did anyone—how did you get there, were you called, or what?
A. I received a call from the Sheriff's Department.
Q. And when you arrived there, do you recall who was there, Lloyd?
A. There was two ambulance drivers and a man and a woman.
Q. Was the defendant there?
A. Yes, sir, he and his mother were sitting inside.

Q. Now, had you known him before this time?
A. Yes, sir.
Q. Did you know his wife before this time?
A. Yes, sir.
Q. And what was her name?
A. Bertha Mae.
Q. O.K. So you knew him and you knew his wife, is that correct?
A. Yes, sir.
Q. Did you know where they lived prior to this time?
A. Not exactly, the house they lived in, I knew the general area, but not the exact house.
Q. When you got there, tell the lady and gentlemen exactly what you observed?
A. When I arrived at the scene, there was two ambulance drivers and a man standing out in the yard, and the ambulance driver led me in the house, and I saw this body lying on the bed, with the feet toward the door where I walked in the house. The body was nude and had been beaten and bruised. To me there wasn't any sign of life in the body. I got ahold of the leg just below the knee and she was cold. And then, I went back to radio the Sheriff's office and had them send Deputy Williams and had them call Mr. Green down to the scene, and while they was on their way down there, I went ahead with some of the investigation, making pictures and talking to some witnesses.
Q. I show you States exhibits number fourteen (14), fifteen (15), sixteen (16), seventeen (17), eighteen (18), nineteen (19), twenty (20), twenty-one (21), twenty-two (22), twenty-three (23), twenty-four (24), twenty-five (25), twenty-six (26), and twenty-seven (27), and ask you if you have ever seen those before, Deputy?
(Witness looks at photographs)
WITNESS (continuing)
A. Yes, sir, I have.
Q. Did you make these photographs?
A. Yes, sir, I did.
Q. And when and where did you make them?
A. I made them at Daniel Gardner's house on June 30th in the A.M.

Q. And, do they depict the inside of the house as it was when you first went in there and observed the inside of the house?

A. Yes, sir, it is just like I saw it when I first went in and took these pictures.

Q. O.K. I show you exhibit number twenty-three (23) marked for identification and ask you what it depicts or shows?

(Witness looks at photograph)

WITNESS (continuing)

A. That is the house and mobile home they lived in.

Q. When you say 'they' who are you talking about?

A. Wilber Gardner and his wife.

Q. You took this picture that morning?

A. Yes, sir, I did.

MR. OLDHAM: Your Honor, I would like to offer into evidence State Exhibit number 23 marked for identification as State exhibit number 1 in evidence.

THE COURT: Any objection?

(Mr. Fitzpatrick looks at photograph)

MR. FITZPATRICK: No objection.

(Marked as State Exhibit 1, Evidence)

MR. OLDHAM (continuing)

Q. State exhibit number 1 has been introduced into evidence, now, what does it show?

A. It shows a house and mobile home, mobile home is a cabana type built to the mobile home, this is the front where you go in the door here.

Q. I would now show you state exhibit number twenty-five (25) marked for identification and ask you also made that photograph?

(Witness looks at photograph)

WITNESS (continuing)

A. Yes, sir, I did.

Q. When did you make it?

A. I made it the same morning.

Q. Same time and place?

A. Same, almost within a . . .

Q. And where was this made?

A. That was the bathroom of the trailer part of the house.

Q. In the trailer part?

A. Yes.

Q. What does this depict or show?

A. Picture shows a bath tub and hair and blood.

Q. Is it the same now as when you originally saw it that morning?

A. Just like when I took the picture.

MR. OLDHAM: Your Honor, I would offer into evidence State Exhibit number twnety-five (25) marked for identification.

MR. FITZPATRICK: No objection.

(Marked as State Exhibit 2, Evidence)

MR. OLDHAM (continuing)

Q. Mr. Shelton, could you stand up here and draw me a diagram of that trailer where the rooms are so I can better understand where everyone was, where the photographs were taken?

(Witness draws)

WITNESS (continuing)

A. This is the cabana, this is the front door—when you go in here, this is one big room in here, this is the door going into bedroom, this is where the victim was lying—

Q. Put 'A' here, this is the front of the house?

A. This is the front of the house—

Q. Put a 'V' in the room where you found the victim—

(Witness marks 'A' and 'V' on drawing)

MR. OLDHAM (continuing)

Q. And where is the bath room?

A. The bath room is in this hall way, here.

Q. What is in this room here?

A. There is a bed here—

Q. Was the victim on a bed in that room?

A. Yes, sir.

(WITNESS returns to the witness stand)

MR. OLDHAM (continuing)

Q. I show you State Exhibit marked number nineteen (19) for identification and ask you if you know what it depicts or shows?

(Witness looks at photograph)

WITNESS (continuing)

A. That is the commode in the bath room and hair in the commode.

Q. Did you make this photograph at the same time you made the others that you testified to?

A. Yes, I did.

MR. OLDHAM: Your Honor, we would offer in evidence State Exhibit Number nineteen (19) marked for identification.

Will be State Exhibit 3.

THE COURT: Any objections?

MR. FITZPATRICK: No objections.

(Marked as State Exhibit 3, evidence)

MR. OLDHAM (continuing)

Q. So, this is the commode that you pointed out here, is that right? (Referring to drawing)

A. I'm not a very good artist, but the bath tub was right beside—

Q. So the bath tub and the commode are both together?

A. Right side by side.

Q. O.K. I show you State exhibit number eighteen marked for identification and ask you if you know what it depicts or shows?

(Witness looks at photograph)

WITNESS (continuing)

Q. Yes, sir, that is the foot of the bed with the victim's feet and bloody sheet, at the foot of the bed.

Q. And what did you do with the sheets and so forth at the foot of the bed?

A. I picked them up and brought them to Inverness to be sent to the lab.

Q. Was this photograph made at the same time as the others you testified to?

A. Yes, sir.

MR. OLDHAM: We would like to offer in evidence state exhibit number eighteen marked for identification, your Honor.

MR. FITZPATRICK: No objection.

(Marked as State Exhibit 4, Evidence)

MR. OLDHAM (continuing)

Q. I show you State exhibit number Four (4) that has been marked and introduced in evidence—is that where you found the garments at the end?

A. Yes, sir, just like that, I never touched them—

Q. This was the feet of the deceased down here (indicates)?

A. Yes, sir.

Q. I would not show you State exhibit number 16 marked for identification and ask if you know what that depicts or shows?

(Witness looks at photograph)

WITNESS (continuing)

Q. Yes, sir, that is going from this living room into this bedroom, this is the door facing, had blood spots on the wall.

MR. FITZPATRICK: To which the defendant objects, this deputy sheriff is not a qualified expert as to whether the spots would be blood or strawberry jam.

MR. OLDHAM: To what I would say, your Honor, he could give his opinion.

MR. FITZPATRICK: Not unless he is a qualified expert, your Honor.

He is not a chemist.

THE COURT: Objection sustained.

MR. OLDHAM (continuing)

Q. Did you make any photographs of that area going into the bedroom?

A. Yes, sir, I got three photo shots of that, same thing there, all three of those were the same. I marked them, put the case number and the date.

MR. OLDHAM: Your Honor, we would like to offer into evidence—were these taken at the same time?

WITNESS: Yes, sir, they were.

MR. OLDHAM: . . . State Exhibit Sixteen (16), Seventeen (17) and Twenty (20) marked for identification.

MR. FITZPATRICK: Your Honor, we are going to object to the pictures, they don't depict a thing, as a matter of fact, I can't even figure out what they are . . . . they

have no relevancy to any issue in this cause, they are just merely pictures.

THE COURT: Objection sustained.

MR. OLDHAM (continuing)

Q. I show you State Exhibit number twenty-seven (27) marked for identification and ask if you know what it depicts or shows?

(Witness looks at photograph)

WITNESS (continuing)

A. Yes, sir, I was standing in the bed room where the victim was lying, and was shooting back toward the other bedroom—I was standing here, taking the picture in this direction—(indicates on drawing).

Q. And what does it depict or show if anything?

A. It shows hunks of hair lying on the floor and a gallon jug.

Q. Is it the same as it was when you took that picture on the 30th day of June 1973?

A. Yes, sir.

MR. OLDHAM: Like to offer into evidence State Exhibit number twenty-seven (27) marked for identification, your Honor.

MR. FITZPATRICK: No objection.

(Marked as State Exhibit 5, evidence)

MR. OLDHAM (continuing)

Q. Would you point out in State Exhibit Number 5 in evidence where the hair was?

A. The hair was lying on the floor, just as you entered, lying right on the floor, right there, (indicates on photograph)

Q. Where is it on this picture, officer?

A. Right here (indicates), dark spot at the bottom . . .

Q. I show you State exhibit number fourteen (14) marked for identification and ask you if you know what it depicts or shows?

(Witness looks at photograph)

WITNESS (continuing)

A. Yes, sir, that is a picture of Glenda Mae Denmey, the deceased's mother.

Q. Did you take that picture at that time?

A. Yes, sir, I did.

Q. Did she look that particular way when you took the picture?

A. Yes, sir, she did.

MR. OLDHAM: I would like to offer into evidence State Exhibit number fourteen (14) marked for identification.

MR. FITZPATRICK: To which the defendant objects, it is a picture of the deceased's mother, not relevant to any issues in this cause, certainly the way she looks has no bearing on the death of Bertha . . . it proves what she looks like but whether or not he hit her—it is imflamatory, and not relevent to the issues in the cause, as between Gardner and his wife.

MR. OLDHAM: Your Honor, I believe it is material due to the fact that it shows the general modusoperandi and conduct of the defendant at the time of the commission of the alleged offense, and there has been testimony prior to this time that he did attack the mother of this deceased, and based upon that I think it is relevent to show what her condition was the next day from the testimony of two witnesses already.

MR. FITZPATRICK: Your Honor, we didn't object to the testimony but a photograph is a different situation. The testimony might be relevent but certainly that photograph isn't.

THE COURT: Objection sustained.

MR. OLDHAM (continuing)

Q. I show you State exhibit number 26 (twenty-six) marked for identification and ask you if you know what it depicts or shows?

(Witness looks at photograph)

WITNESS (continuing)

A. Yes, sir, that is a picture of the victim.

Q. And, is that the way the victim was when you got there?

A. That is just the way the victim was lying whenever I got there.

Q. Was anyone else present when you made the photograph?

A. Not in this room, the two ambulance and myself

walked in, and I looked the situation over and went back and got my camera and asked them to move back out while I was making the pictures.

MR. OLDHAM: Your Honor, at this time we would offer into evidence State Exhibit number 26 marked for identification.

MR. FITZPATRICK: Can I ask a couple questions?

QUESTIONS BY MR. FITZPATRICK:

Q. Mr. Shelton, that picture depicts a body, did you know Bertha before this occurred?

A. Yes, sir, I have seen her off and on for about two years.

Q. What would you say this is (indicates photograph)

A. What?

Q. That thing right there?

A. That lifter?

Q. What is it?

A. The ambulance drivers put that there to lift her up.

MR. FITZPATRICK: We object to the introduction of the photograph in evidence, sir, it is obvious from the photograph that that body is not in the same position it was at the time of the alleged crime.

MR. OLDHAM: To that I would say, your Honor, that the Supreme Court decided that issue in Wesley vs. State, 244 Southern Second 418.

THE COURT: Objection overruled.

(State Exhibit twenty-six (26) identification marked as State exhibit 6 evidence)

MR. OLDHAM (continuing)

Q. State Exhibit Number 6 is the picture of the victim as you saw her?

A. Yes, sir.

Q. When you saw her, did you notice any bruises or wounds or anything like that?

A. Yes, sir, she was bruised from her feet all the way, and more bruised so in between the legs.

Q. Did you notice anything about her head, officer?

A. Yes, sir, her hair had been pulled out.

MR. FITZPATRICK: To which the defendant objects, calls for a conclusion on the part of the deputy. He can testify her hair was missing, certainly not that it was pulled out.

WITNESS: Approximately one-third of her hair was missing in the front

MR. FITZPATRICK: Move to strike that portion of the testimony from the record.

THE COURT: Motion granted.

MR. OLDHAM (continuing)

Q. I show you State Exhibit number thirty (30) marked for identification and ask you if you have ever seen it before, officer?

(Witness looks at exhibit)

WITNESS (continuing)

A. Yes, sir, I have.

Q. Where did you first see it and when?

A. It Dan Gardner's house, it was lying on the floor by the couch.

Q. What room are you talking about now, officer?

A. The couch was here (indicates on drawing) by the front door.

MR. FITZPATRICK: Did he mark the placement of the bottle?

MR. OLDHAM: Mark a 'B' where you found the bottle.

(Witness marks 'B' on drawing)

MR. OLDHAM (continuing)

Q. And, State exhibit number 30 marked for identification, what did you do with it after you saw it there, officer?

A. I picked the bottle up and brought it to the jail, sent it to the lab.

Q. Who did you turn it over to?

A. I turned it over to Deputy George Hanstein.

Q. And you turned the other evidence over to Deputy Hanstein?

A. I turned all I had over to Deputy Hanstein.

Q. So, all the evidence, tangible evidence that you are testifying to that comes up here, you turned it all over to him at the jail?

A. Yes, sir. I did.

Q. And what date and time did you turn it over to him?
A. I turned it over to him on the 30th day of June, in the A.M.
Q. Is this bottle the same now as you saw it in the early morning on the 30th day of June, 1973 at the defendant's home?
A. Yes, sir, the stopper was off of it, it was lying on the floor across from—I put the date, criminal report number and initialed it.
Q. That is your initial?
A. Yes.
MR. FITZPATRICK: Did you offer that in evidence?
MR. OLDHAM: No—
MR. OLDHAM (continuing)
Q. I show you State Exhibit number twenty-eight (28) marked for identification and ask if you have ever seen it before, officer?
(Witness looks at exhibit)
WITNESS (continuing)
A. Yes, sir, I did.
Q. And when is the first time you ever saw it?
A. That morning, I got it off the couch where he was sitting.
Q. When you say 'he', who is that?
A. Dan Gardner.
Q. That fellow over there (indicates defendant)
A. Yes, sir.
Q. And it was on the couch, was it on anybody?
A. No, sir, just lying on the couch.
Q. And what did you do with State Exhibit number twenty-eight that has been marked for identification?
A. Put in plastic bag, put tag and everything on it and turned it over to Deputy George Hanstein.
Q. For what purpose?
A. To send it to the lab.
Q. I show you State exhibit number thirty-one (31) marked for identification and ask if you have ever seen it before, officer?
(Witness looks at exhibit)
WITNESS (continuing)

A. Yes, sir, I have.
Q. When is the first time you saw it and where did you see it?
A. Saw it June 30th, 1973, in Dan Gardner's house.
Q. What is it?
A. It's clothes believing to be the victim's.
MR. FITZPATRICK: Move to strike the voluntary remarks by the witness, and ask the jury be instructed to disregard it.
THE COURT: Objection sustained, motion granted, the jury is instructed the statement of this witness as to he believed to be the clothes of the victim.
MR. OLDHAM (continuing)
Q. Where did you find this exhibit, officer?
A. Do you want me to show you (refers to drawing)?
Q. Yes.
A. It was in the corner of the cabana part of the house, it was in this corner (indicates on drawing) and other sheets and clothes on top of it.
Q. What did you do with State Exhibit number thirty-one that has been marked for identification?
A. I picked it up, marked it, initialed it and brought it in and turned it over to Deputy George Hanstein to go to the lab.
Q. Did you initial anything, officer?
A. Yes, sir, I did—I initialed the bag and all those pieces in there.
Q. I show you State Exhibit marked number twenty-nine for identification and ask if you have seen this before?
(Witness looks at exhibit)
WITNESS (continuing)
A. Yes, sir, I have.
Q. When is the first time you saw it?
A. They was in Dan Gardner's house.
Q. Where?
A. One was one place and one another . . . One of them was, I don't know exactly, but he didn't have them on, he picked them up and put them on after I arrested him and brought him to jail, I took them off of him and held them for evidence.

Q. Are they the same now as they were when you picked them up there at his house?

A. Yes, sir, I tied them together and tagged them and put each shoe in a separate bag, and turned them over to Deputy George Hanstein to go to the lab.

Q. I show you State exhibit number thirty-two marked for identification, officer, and ask you if you have ever seen this before, sir?

(Witness looks at exhibit)

WITNESS (continuing)

A. Yes, sir, I have.

Q. What is it, if you know?

A. It's sheets and pillow case, wash cloth.

Q. Where did you first see this item?

A. They was in different spots—two sheets were at the foot of the bed, the other sheet was in this corner of the living room.

Q. What did you do with these articles?

A. I dated them, put the case number on them, initialed them, brought them to the jail and turned them over to Deputy George Hanstein.

Q. I show you State's Exhibit number 34 thirty four, and composite exhibit number thirty-three (33) and ask if you have ever seen those before?

(Witness looks at exhibit)

WITNESS (continuing)

A. No, sir, I don't recognize that.

Q. You don't recognize State Exhibit number thirty-four—is that right?

A. No, I don't. Number thirty-three (33) is hair samples taken out of the house of Wilber Gardner's . . .

Q. Where did you find this particular hair sample?

A. In the living room.

Q. This came from the living room?

A. This came from the living room, and this is hair samples and it came out of the bed room—

Q. Which bedroom are you talking about, officer?

A. I can't see if that's the room she was in, or the room next to the room she was in . . . I believe this is the hair samples out of the room next to the room she was in.

Q. Then you picked these hair samples up from around the house, is that right?

A. Yes, sir, I did.

Q. What did you do with State Exhibit Number 33 marked for identification?

A. I brought it over and turned it over to Deputy George Hanstein—sent it to the lab.

Q. I show you State Exhibit number thirty-five marked for identification, and ask if you know what it depicts or shows?

(Witness looks at exhibit)

WITNESS (continuing)

A. Yes, sir, I scrapped some substance off of his fingernails.

Q. Well, now, who is 'he'?

A. Wilber Gardner. Dan Gardner. The defendant, over there.

Q. You say you scrapped some things off his fingernails?

A. Yes, sir, from around his fingernails and under his fingernails.

Q. Where and when did you do that?

A. I did that at the jail and turned it over to Deputy George Hanstein.

Q. And what date and time did you take the fingernail scrappings from him?

A. This was the same day that I brought him over to the jail, in the morning.

Q. That would have been the 30th day of . . .

A. 30th day of June, 1973.

MR. FITZPATRICK: Did he state what time it was?

WITNESS: It was in the A.M., it was after we got over to the jail, I don't remember the exact time.

MR. OLDHAM (continuing)

Q. Now, did you have occasion to go to go to Leesburg General Hospital on or about that period of time?

A. No, sir, I didn't.

Q. Is this house that he and his wife were living in located in Citrus County?

A. Yes, sir it is.

Q. Now, did you advise this defendant of anything once you got their, officer?

A. Not immediately, when I got there, I did a little investigation to find out who had committed the crime, so I arrested Wilber Gardner and advised him of his rights.

MR. FITZPATRICK: Excuse me, Mr. Oldham—your Honor, we object to technicalities, this witness is still making voluntary statements, making investigation to see who committed a crime—it hasn't been established yet that there has been a crime committed. Move the court to instruct the jury to disregard it and also strike it from the record. That is what we are here for.

THE COURT: Motion granted, jury instructed to disregard that portion of the witness statement objected to by the defendant's attorney.

MR. OLDHAM (continuing)

Q. When you got there, officer, did you question the defendant at any time?

A. No, sir.

Q. Did you advise this defendant of his constitutional rights?

A. Not when I first got there.

Q. I didn't ask you that, I said 'did you'?

A. Yes, sir.

Q. When did you advise him of his constitutional rights?

A. When I arrested him.

Q. How long had you been there before you arrested him, officer?

A. Approximately, I would say approximately thirty, thirty-five minutes.

Q. And will you tell the ladies and gentlemen of the jury exactly what you advised him of?

A. I advised him he didn't have to say anything, that anything he said could and would be used against him in a court of law, and if he didn't have money for an attorney, the state would afford him one at no cost to him, and asked him if he understood his rights, and he said that he did.

Q. So, you gave him what was known as the Miranda warnings, is that right?

A. Yes, sir.

Q. All right, after you had given him that warning, did he make any statement to you, officer?

A. No, sir, I started to put the handcuffs on him, and he said 'you don't have to do that', and I said 'well, it's a very serious crime, and I will have to put the handcuffs on you', and then I took him out to the car.

Q. Did he make any statement to you after you had taken him to the car on the way back to Inverness?

A. Yes, sir, we are driving along, on along about the Sugar Mill Tavern, we wasn't having any discussion, just driving along, and he made the statement to me about his wife had been running around with other people, and said she had been out with his brother, and he said 'that thing has been eating on me', he said 'it was just more than I could stand'.

Q. That's all he said?

A. I probably got a little bit ahead of myself—first he said 'why would a man do something like that',—'why did I do something like that', and I said 'why did you'? and that is when he told me what he did.

Q. Let's go back over that again—he said 'why would a man do something like that'—what was he referring to?

A. About the death of his wife.

MR. FITZPATRICK: We again move the court to instruct the witness to stop making voluntary statements—move to strike it from the record and ask the jury to disregard it. He doesn't know what he was referring to.

THE COURT: Motion granted, the jury is instructed to disregard that portion of the witness' statement objected to by the defendant's attorney.

MR. OLDHAM: No further questions of this witness at this time.

CROSS EXAMINATION BY MR. FITZPATRICK:

Q. Deputy Shelton, you have testified here today as to what you saw at the home of Dan Gardner is that correct?

A. Yes, sir.

Q. You don't have any knowledge of what happened at

that house that morning or the night before or early in the morning, or ten minutes before you got there, do you?

A. No, sir, I don't.

Q. You don't have any knowledge as to why was involved in this alleged attack on this woman, or anything else, do you?

A. Don't have any knowledge?

Q. Only, you are only testifying to what you found at the scene, isn't that correct?

A. Yes.

Q. You don't know anything else about it, do you?

A. No.

Q. You don't know who the clothes belonged to, you don't know what those things the State Attorney just showed you, you don't know where they come from or who they belonged to, do you?

A. No, sir, I don't.

Q. They could have belonged to anybody, is that correct?

A. That's correct.

Q. You are not trying to tell this jury that any of those articles there belonged to any body, I mean, belonged to Dan Gardner?

A. No, sir.

MR. FITZPATRICK: Thank you.

RE-DIRECT EXAMINATION BY MR. OLDHAM:

Q. Mr. Fitzpatrick asked you, you didn't know what happened there—I would ask you if this defendant did not give you a signed statement on the 30th day of June 1973 concerning what happened that night?

A. Yes, sir, he did.

Q. And was it in writing?

A. Yes, sir. He gave us a statement, the secretary over there took it down, typed it out, and he read it and then signed it.

Q. Had he been advised of his rights under the Miranda at the time he gave the statement?

A. Yes, sir, he did, when I got him in there and asked did he want to give a statement, and he said he did, and I

advised him at that time that he didn't have to do it, he could do it voluntarily, and he did.

Q. What did he tell you in that statement?

A. I can't remember, I've got a copy of it. Do you want me to read it?

Q. Just tell basically what he told you in that statement he gave you.

A. He just told me that he and his wife had got into a fuss, after they had got home and he beat her and then she got up and went and took a bath, got back in the bed and he beat her some more, and then he said he went to sleep and he didn't wake up until the next morning.

MR. OLDHAM: No further questions.

MR. FITZPATRICK: No further questions.

WHEREUPON the witness was excused.

WHEREUPON, the witness, DAVID CHANCEY was called by the State and having been sworn, testified as follows:

DIRECT EXAMINATION BY MR. OLDHAM:

Q. Would you state your full name and address for the lady and gentlemen of the jury, please sir?

A. My full name is David Reid Chancey, R-e-i-d, my Address is Star Route 2, Dunnellon, Box 306Y, Dunnellon.

Q. Mr. Chancey did you have occasion on the 30th day of June, 1973, to go to the home of Daniel Wilber Gardner and his wife, Bertha Mae Gardner?

A. No, sir.

Q. Did you have occasion to—let me show you this—I show you state exhibit number six (6) in evidence and ask you if you have ever seen that body before?

(Witness looks at exhibit)

WITNESS (continuing)

A. Yes, sir.

Q. Where did you first see it?

A. At Citrus Memorial Hospital.

Q. And what did you do with the body if anything?

A. I took the body from Citrus Memorial to Leesburg General.

Q. And, when was that?

MR. FITZPATRICK: Excuse me, Mr. Chancey—this gentlemen seems to have some notes in front of him that he is reading from.

WITNESS (continuing)

A. This is an ambulance service sheet—

MR. FITZPATRICK: Q. I would like to know when it was made, was it made yesterday?—When were those notes made that you are reading from?

WITNESS: This sheet was made on Six-thirty—

MR. FITZPATRICK: That evening?

WITNESS: We make it on each run, at the time we make the run.

MR. FITZPATRICK: When you got through taking the body over there, then you made the report?

WITNESS: We put the name on, . . .

MR. FITZPATRICK: Did you make it on June 30th?

WITNESS: Yes, sir.

MR. FITZPATRICK: Withdraw the objection.

MR. OLDHAM (continuing)

Q. So, you took the body to the Leesburg Hospital, is that right?

A. Yes, sir.

Q. Did you leave the body here?

A. Yes, sir.

Q. Did you go get the body later?

A. No, sir.

Q. Did anybody go with you when you took the body over there?

A. No, sir. It has on here the time we left the hospital, time we arrived destination . . . .

Q. Well, how about telling us what time you left the hospital?

A. I left the hospital, dispatch time was Nine-ten A.M., the arrival time was Nine-fifty-five A.M., returned to hospital at Eleven A.M.

Q. And this is the body you took (referring to exhibit)

A. Yes.

MR. OLDHAM: No further questions of this witness, Your Honor.

CROSS EXAMINATION BY MR. FITZPATRICK:

Q. You don't know who that is in that picture, do you? You only know what somebody told you?

A. Other than what I have on here, what the name . . . . .

MR. FITZPATRICK: No further questions.

MR. OLDHAM: No further questions, your Honor.

WHEREUPON, the witness was excused from Court.

THE COURT: Members of the jury, it is a little after Five o'clock, we are going to take a recess very shortly. I want to admonish all of you again not to discuss the case among yourselves or with anyone else for form or express any opinion about the merits of the case. I cannot emphasis too strongly that you should not discuss the case with anyone, even your wives, or friends or anyone. If anyone does attempt to talk to you about the case, notify me when you return in the morning promptly because it would be an act of contempt of court and to be punished as such. Now I am going to ask that when you come back tomorrow you bring overnight sleeping garments, toothbrush, it may be necessary for this case to be continued over to the next day and if it is, then we will have to keep you together. We will make arrangements for you to stay at one of the local motels and you will be given your meals and your motel accomodations. I will ask that you be back in the jury room at Nine thirty in the morning. Please escort the jury out.

WHEREUPON, the jury was escorted from the court room.

WHEREUPON, the defendant was escorted to the holding room.

THE COURT: Court will be in recess until Nine-thirty in the morning.

WHEREUPON, court was in session, January 9, 1974, Ten Twenty A.M. Defendant brought into court room, seated at defense table.

(AT THE BENCH):

MR. KOVACK: Your Honor, we move that this matter be mistried, make a motion for mistrial on the basis of Furr vs. State, 229 Southern Second 269, in that the State used a

relative of the deceased to identify the body, and the last witness put on last night was Deputy Shelton who could have identified the body. They did not have to use a relative, the mother of the victim, and the State has committed error, and we move for a mistrial.

MR. GREEN: In support of our motion to deny the request we feel the record supports our position, there was genuine and real purpose for placing the mother on the stand. She testified to facts not known by Deputy Shelton, as to certain statements made to the mother by the defendant.

THE COURT: Motion is denied.

MR. KOVACK: The second motion for mistrial, your Honor, the Tampa Tribune dated January 9, 1974, in which the headlines read 'Mother Weeps Over Victim's Photo'—as I got out of my automobile this morning, in front of the Sheriff's office, I was approached by one of the jurors who made mention it was foggy this morning, and he stated he thought the jury was to return at Nine-thirty this morning but the paper indicated Nine A.M. As I recall, I believe his name is Segal. I had no further conversation with him other than what I have stated in the record. Based on this, I move for a mistrial.

MR. GREEN: We do not know for a fact this juror read the paper, it is nothing than a mere suspicion at this time.

THE COURT: Have you had a chance to read the article?

MR. OLDHAM: I have glanced through it, your Honor, and I see nothing in the article that was not reflected verbatem by the witnesses.

THE COURT: I find nothing in the article that was not brought out in the testimony, nothing there other than just statements of the witnesses.

MR. KOVACK: We feel the two together would be prejudicial error.

THE COURT: The attorneys are under the instruction not to talk with the jurors and I point out that you yourself could place yourself in jeporady [sic] by talking with him. I have specifically told, announced several times in all proceedings that the attorneys are not to talk to or associate with the jurors. Motion is denied.

WHEREUPON, discussion ended at the bench.

WHEREUPON, the jury was escorted from the jury room to the court room and seated in the jury box.

WHEREUPON, DOCTOR WILLIAM H. SHUTZE was called by the State and having been sworn, testified as follows:

DIRECT EXAMINATION BY MR. OLDHAM:

Q. Would you state your full name and your address for the lady and gentleman of the jury, please?

A. I'm William H. Shutze, I'm a pathologist in Leesburg.

MR. OLDHAM: Your Honor, I would submit that this is an expert witness within the meaning of the law of the State of Florida,

MR. FITZPATRICK: No objection.

MR. OLDHAM (continuing):

Q. I show you State Exhibit number 6 that has been admitted to evidence and ask you whether or not you have ever seen that particular person before?

(Witness looks at photograph)

WITNESS (continuing)

A. Yes.

Q. And when did you see her, Doctor?

A. It was on the 7-2-73 at the Leesburg General Hospital in the morgue.

Q. That would have been July 2nd?

A. Yes.

Q. And did you ascertain what her name was?

A. Yes.

Q. What was her name?

A. Bertha Mae Gardner.

MR. FITZPATRICK: To which the defendant objects, proper predicate has not been laid, move to strike.

MR. OLDHAM: To that I would say, your Honor, he has identified the body of the deceased, he states that he has ascertained the name, so I think it is proper for him to divuldge the name of the person involved.

MR. FITZPATRICK: There is no ascertaining there, sir. He is just saying that is the deceased we are talking

about—he doesn't know that is the deceased. Proper question is whether he knows that is her or not, not whether he has ascertained it by some hearsay—

THE COURT: Approach the bench.

(Whereupon, there was discussion at the bench, Mr. Fitzpatrick, Mr. Oldham; whereupon discussion at the bench ended:)

MR. OLDHAM (continuing)

Q. How did you ascertain the name?

A. The name of the individual was on a name tag on the body.

Q. And from the name tag and the identification of the photograph, that was the body you performed the autopsy on?

A. Yes, sir.

Q. Who was present when you performed this autopsy?

A. Bob Teese, the photographer.

Q. Did he take pictures at the time you were performing this autopsy?

A. Yes, he did.

Q. How long did it take you to perform this autopsy, Doctor?

A. Took approximately two hours.

Q. Will you tell the ladies and gentlemen of the jury exactly what you observed of this body before you attempted to perform the autopsy, give as much detail as possible?

A. This was a white woman, approximately twenty-six years of age which was unclothed, there were many contusions of the scalp, bruises of the scalp, on both sides and in some of the bruises there were abrasions or scrapes in the center where the skin had been taken off. There were bruises around both eyes, there was a deep cut below the right eye, and down on the brain you could take the scalp forward and it was just a massive hemorrhage into the scalp in this area around this way. There was a contusion on the bridge of the nose. Over the chest there were fifteen or twenty bruises over the breast and sides of the chest, varying from a half inch to an inch in diameter. There were multiple bruises on the abdomen varying from one-half inch to one inch also in diameter. There was a mas. ive hemorrhage

into the pubic area down on the innter[sic] survaces [sic] of the thigh, and the labia of the vulva, the external genitalia of the woman was all swollen and bruised. There was also [a] large abrasion on the inner surface of the left thigh, area approximately one and a half by three inches. On the arms and the legs there were many bruises also varying anywhere from a half inch to three inches in diameter. Same thing over the back. I would estimate in total bruises on the body that there were somewhere in the neighborhood of at least a hundred. On opening the body, the lung and heart were essentially normal, there was some accumulation of fluid inside the lung. The liver showed a large, what we call laceration or tear almost to the entire right side of the liver and there was approximately five hundred cc's of blood in the abdominal cavity. There was hemorrhage in or around the right adrenal gland and the right kidney, lays in the body kind of behind the liver and down a little bit. In the lower portion of the body, the peritoneal cavity, the pubic bone was just broken up into small pieces from blunt injury such as being stomped, or—that is about the only way I could think it could be done. The perineum, on the perineum there is a large laceration extending from the posterior part of the vagina down towards the anus and inside the vagina the large tears all the way from the outside entrance up to the back as far as it could go. The brain showed small areas of hemorrhage under the covering of the brain, there were no hemorrhages in the brain. That's about it.

Q. What about the legs, did you find any bruises?

A. Many—many bruises on the legs.

Q. I see. Could you ascertain, as an expert whether anything was placed in the vagina of the woman?

A. Yes, there had to be, some sort of a round or square, such as a broom stick or a bat or a bottle or something like this.

Q. Doctor, could you estimate with the number of wounds whether they were committed, whether they were there by instrument, first, stomping, rolling on the floor, or what?

A. I think it was probably a combination of all, the abra-

sions on the head, there were so many, I couldn't see how it could be possible to be done by fist, they were so massive. Also I am sure some of the injury occurred from grabbing the hair and pushing the head against either a wall or the floor or what have you, and as a result in the violence of it all he had pulled her hair out, there were patches of bald spots.

Q. Did you blood type this deceased and find out what blood type she was, Doctor?

A. Yes, she was Group B RH positive.

Q. Group B RH positive? . . . I show you State Exhibit number 7 for identification, 6 for identification, 5 for identification, 4 for identification, 1 for identification, 13 for identification, 12 for identification, 11 for identification, 10 for identification, 9 for identification, 3 for identification, 1 for identification, and 8 for identification. I ask you whether or not you were present when these photographs were taken?

(Witness looks at photographs)

WITNESS (continuing)

A. Yes. Yes, I was present.

Q. Do these photographs depict the victim and certain aspects of the autopsy that you performed?

A. Yes, sir.

Q. And you were present at the time?

A. Yes, I was.

Q. And do you know who took those photographs?

A. Mr. Teese, from Leesburg.

Q. I see. Doctor, can you tell this lady and gentlemen in a medical opinion what this woman died from?

A. She died as a result of a combination of loss of blood from the large tear in the liver, which bled in the peritoneal cavity, and from the fracture of the pubic bone, in a fracture of a bone this size you lose a large amount of blood,and also as a result of the trauma to the body which as result the two of them would result in shock and subsequent death.

Q. Doctor, how long would a person live that received a beating such as this?

A. With this much trauma, I would estimate approximately fifteen to twenty minutes.

Q. Doctor, from your autopsy could you tell whether or not all of the bruises occurred at one time or did they occur over an hour or anything of that nature?

A. I am sure they all occurred over a short period of time.

Q. Did you weigh this deceased to determine how much she weighed?

A. No, I estimated.

Q. What was your estimate?

A. Ninety pounds.

Q. Do you recall what date those photographs you saw were taken, doctor?

A. On 7/2, the same day of the autopsy.

Q. Where?

A. At Leesburg General Hospital

Q. Doctor, did you ascertain whether or not the victim would have been unconscious during part of the blows administered to her, or would she have been conscious during the whole time, is there any way you could tell?

A. It is difficult to say exactly, but from the trauma to the head it would not be surprising that she would be unconscious.

Q. When the other possible blows were administered to her?

A. Yes, saying that the blow to the head were first. But if the blows to the head were later on she would have been alert.

Q, If the blows to the rest of the body had come before the blows to the head, then she would have been alive and alert . . .

MR. FITZPATRICK: To which the defendant objects, the state attorney is leading this witness . . .

MR. OLDHAM: I will withdraw the question.

MR. OLDHAM (continuing)

Q. Now, I would like to go back to the hair, Doctor . . . tell me about the condition of the woman's hair?

A. She had patches, large patches of hair that were missing which were not of a disease nature, it was from ac-

tually being pulled out rather than losing it naturally or due to some disease process.

Q. And what about the back of the skull?

A. The bone was in tact, no skull fracture, there was a marked degree of hemorrhage into the scalp, in the back.

MR. OLDHAM: You may inquire.

CROSS EXAMINATION BY MR. FITZPATRICK:

Q. Doctor, last evening, I called some friends of mine, ...

MR. OLDHAM: Your Honor, that hasn't got anything to do with . . .

MR. FITZPATRICK: I will withdraw it.

MR. FITZPATRICK (continuing)

Q. Where is Creighton University, Doctor?

A. Creighton University is in Omaha, Nebraska.

Q. Doctor, when you received this white female, you said twenty-six years old?

A. Twenty-six is the age that was given to me.

Q. Was anybody present when the body was delivered to you?

A. No.

Q. How was the body physically delivered to you?

A. It was transported via the Citrus County Ambulance.

Q. Did you know the ambulance driver?

A. I was not physically present when the body was delivered.

Q. Do you know how the name tag got attached to the body?

A. Yes, the body was delivered to the emergency room of the Leesburg General Hospital, the nurse . . .

Q. Just a minute, doctor,—do you know how that particular tag got attached to that particular body? Were you present when it was done?

A. No.

Q. You don't know how that tag got on there, do you? Of your own personal knowledge?

A. No, it is a matter of assumption.

Q. Doctor, as far as you know, that could have been Billy Jo King, isn't that correct?

A. I have to go by what . . . .

Q. I am not asking you what you have to go by, Doctor. You don't know who the name of that body was, do you?

A. Not really.

Q. And when you testified here today that was Bertha Gardner, you don't really know that was Bertha Gardner, do you?

A. It was Bertha Gardner's name on the body.

Q. I didn't ask you that— you don't know that that was Bertha Gardner, do you?

A. I don't know why it would have another name on it.

Q. You don't know that that was Bertha Gardner, do you, Doctor?

A. To get right down to it, I guess not.

Q. You don't? And when you testified here this morning that you performed an autopsy on Bertha Gardner, you testified from an assumption, didn't you?

A. With the photographs that were taken I'm sure the State Attorney, if this were the wrong body . . .

Q. Doctor, I don't want any voluntary statements— just answer the question.

A. Yes, sir.

MR. FITZPATRICK: We move to strike the entire testimony of the Doctor, it is all a matter of hearsay, there is no identification of the body.

MR. OLDHAM: Your Honor, there has been ample identification, the photograph has been placed in evidence, he has identified the photograph as being the body he performed the autopsy on, and that photographs was identified as being the deceased in this case by the deceased's mother. The mother of the defendant also identified the photograph, and Mr. Shelton.

THE COURT: Escort the jury out, please.

WHEREUPON, the jury was removed from the court room.

THE COURT: What photographs of the victim have been introduced into evidence?

(Mr. Oldham hands photographs to the Court)

THE COURT: This is the photograph that was identified by the victim's mother?

MR. OLDHAM: The mother, and Mr. Shelton, your Honor, and also by Dr. Shutze.

THE COURT: This is exhibit 6—State Exhibit Number 6. And Dr. Shutze has identified the victim from State Exhibit 6?

MR. OLDHAM: Is that correct, Doctor?

DR. SHUTZE: Yes.

THE COURT: I was not certain in my own mind, he identified some photographs that were introduced for identification purposes only, so that I am certain of this, Mrs. Davis, would you verify exhibit number 6 has been identified by Dr. Shutze?

COURT REPORTER: —Question: I show you State Exhibit number 6 that has been admitted to evidence and ask you whether or not you have ever seen that particular person before?—Yes. —And when did you see her, Doctor?—It was on the 7-2-73 at the Leesburg General Hospital in the morgue.—That would have been July 2nd?—Yes.—And did you ascertain what her name was?—Yes. And what was her name?—Bertha Mae Gardner.

THE COURT: Motion denied.

MR. FITZPATRICK: Your Honor, let me ask him out of the presence of the jury about this photograph—Doctor, when was the last time you saw this photograph?

DR. SHUTZE: This morning.

MR. FITZPATRICK: Before that?

DR. SHUTZE: Never seen it before.

MR. FITZPATRICK: You had never seen this before?

DR. SHUTZE: No.

MR. FITZPATRICK: Doctor, how many autopsies have you performed since July 2nd of 1973?

DR. SHUTZE: July 2nd?—approximately sixty.

MR. FITZPATRICK: And you can positively identify that woman as the one you performed the autopsy on on July 2nd?

DR. SHUTZE: Yes.

MR. FITZPATRICK: Nobody has indicated to you who this body was?

DR. SHUTZE: No.

MR. FITZPATRICK: That's all.

MR. FITZPATRICK: We renew the motion.

THE COURT: Motion denied. Bring the jury back in, please.

WHEREUPON, the jury was returned to the court room, seated in the jury box.

MR. FITZPATRICK (continuing)

Q. Doctor, I believe you testified that the multiple contusions and bruises and one thing or another that were on the body were probably placed there in a short period of time?

A. Yes.

Q. Now, what do you define as a short period of time? Thirty minutes, fifteen minutes—

A. Yes—fifteen to thirty minute period.

Q. It wasn't over a period of four or five hours?

A. Oh, no.

Q. Doctor, did you perform any blood alcohol test on this body?

A. Yes, I did.

Q. And what did you find?

A. Was a Hundred and Ninety milligrams percent, .19 grams percent which would indicate mild to moderate intoxication.

Q. Now, you are talking about .19—does that have anything to do with the .10 that would come from a breathalyzer?

MR. OLDHAM: Objection, your Honor, this is improper cross for one thing, and secondly, he is trying to go into a field that this man is not an expert in, it would be the alcohol breathalyzer test, this man is not an expert as to breathalyzer.

THE COURT: Objection sustained as to the second ground.

MR. FITZPATRICK (continuing)

Q. Doctor, what would you term the intoxication with the percent you just mentioned?

A. Legal intoxication is .10.

Q. What would you term her intoxication in terms of slight, heavy, . .

A. Mild to moderate.

Q. Now when you say legal intoxication is .10?

A. Right.

Q. What do you mean by that?

A. Well, this as determined by law to be legally intoxicated while driving.

Q. In other words, if you are .10 you are intoxicated?

A. Correct.

Q. And if you are .19, you are much more intoxicated?

A. Right.

Q. Is that correct?

A. Correct.

MR. FITZPATRICK: Thank you, Doctor.

MR. OLDHAM: I have no further questions.

WHEREUPON, the witness was excused.

WHEREUPON, the witness, CHANDLER SMITH was called by the State and having been sworn, testified as follows:

DIRECT EXAMINATION BY MR. OLDHAM:

Q. Would you state your full name for the ladies and gentlemen of the jury, please sir?

A. My name is Chandler Smith.

Q. What is your address?

A. Sanford, Florida—I live in Deland, work in Sanford.

Q. What is your employment?

A. I work at the Sanford Crime Lab.

Q. And, what are your duties there?

A. I'm a criminalist examiner, I examine material submitted by law enforcement agencies that is relative to capital crimes and more specific than that, the blood, hair, fibers, this type of material, different from drugs, narcotics . . .

Q. What experience and training have you had?

A. I have worked at the crime lab now for about two and a half years, prior to that my education, I have a bachelor of science degree from Stetson University.

Q. Approximately how many samples have you examined during the last two and a half years?

A. Individual exhibits would number in the thousands some where.

Q. Have you ever testified as an expert witness before?

A. Yes, I have.

Q. And what courts have you testified in?

A. In capital cases, murders and rapes, I have testified in Lake County, Orange County, Brevard, Volusia County.

MR. OLDHAM: Your Honor, we submit that this is an expert witness within his field and training and should be allowed to testify as an expert.

MR. FITZPATRICK: No objections.

MR. OLDHAM (continuing)

Q. I show you State Exhibit Number thirty-five marked for identification and ask you to tell us if you have seen it before?

(Witness looks at exhibit)

WITNESS (continuing)

A. Yes, sir, I have.

Q. When did you first see it, sir?

A. This was submitted by Investigator George Hanstein of the Citrus County Sheriff's Department on the 6th of July, 1973, at 10:30 in the morning.

Q. And did you run any examinations on it?

A. Yes, sir. The envelope contained fingernail scrapings, actually pieces of dirt and flesh, it was submitted as fingernail scrapings. It contained human blood mixed with dirt and sand. It was insufficient blood to determine what group it was. But, it was human blood.

Q. And how do you analize [sic] the finger nail scrapings to determine whether or not it is human blood or not?

MR. FITZPATRICK: To which the defendant objects and move to strike the testimony of this witness in connection with the fingernail scrapings inasmuch as he has testified positively that the blood that was contained therein was not identified. Wouldn't have any bearing on this case.

MR. OLDHAM: The blood is not identifiable by type, your Honor.

MR. FITZPATRICK: He said it was blood—so it is blood—

MR. OLDHAM: Further, your Honor, I think the exhibit shows the scrapings came from the defendant in this case.

MR. FITZPATRICK: We've got nothing to argue about there, Judge. But it doesn't have any bearing as to whether or not this murder was committed. He could have cut his finger.

MR. OLDHAM: These were scrapings from under the fingernail, your Honor.

(Discussion at the bench, Mr. Oldham, Mr. Fitzpatrick and the Court; discussion at the bench ended)

THE COURT: Objection overruled.

MR. OLDHAM: At this time, your Honor, we would like to offer into evidence State Exhibit Number 35 marked for identification into Evidence as State Exhibit Number Eight (8).

MR. FITZPATRICK: Defense would object to the introduction on the same grounds as to the testimony of this witness.

THE COURT: Objection overruled.

(State Exhibit thirty-five (35) identification) marked as State Exhibit Eight (8) evidence.)

MR. OLDHAM (continuing)

Q. I show you State Exhibit twenty-eight (28) marked for identification and ask if you have ever seen it before?

(Witness looks at exhibit)

WITNESS: continuing

A. Yes, I have.

Q. When and where did you see it?

A. At the same time and place as the previous exhibit.

Q. Did you receive it at the exact same time and under the exact same conditions as the finger nail scrapings that you testified?

A. Yes, sir.

Q. Did you run any test on State exhibit number twenty-eight (28) marked for identification?

A. Yes, I have.

Q. What examination did you run on State Exhibit twenty-eight (28) marked for identification?

A. Looked specifically for blood stains and there was a blood stain on the inside cuff of the left sleeve and this was ABO group B, human blood.

Q. Human Blood, group B?

A. Yes.

MR. OLDHAM: Your Honor, at this time, we would like to offer into evidence State exhibit number twenty-eight (28) which would be State Exhibit number nine (9) evidence.

MR. FITZPATRICK: The defendant is gong to have to object to the introduction of this, your Honor—there is no testimony here as to whose shirt it is, what type blood it was . . .

MR. OLDHAM: He testified it was Type Blood B.

MR. FITZPATRICK: I believe the Doctor testified it was BRH positive.

THE COURT: Whose shirt is it?—has it been established?

MR. FITZPATRICK: No, sir.

(Discussion at the bench, Mr. Oldham, Mr. Fitzpatrick and the Court; discussion at the bench ended)

THE COURT: Objection sustained.

MR. OLDHAM (continuing)

Q. I show you State exhibit number thirty (30) marked for identification and ask you if you have seen it before?

(Witness looks at exhibit)

WITNESS (continuing)

A. Yes, sir, I have.

Q. When was the first time that you saw it?

A. That again was submitted by Deputy Hanstein, Citrus County Sheriff's Department, 6th of July, 1973 at 10:30 in the morning.

Q. And, did you run any test on it?

A. Yes, sir, I did.

Q. What kind of test did you run?

A. This was stained with one spot of blood in the neck area, there was insufficient for specie determination or blood type.

Q. I show you State exhibit number thirty-three (33) and thirty-four (34) marked for identification and ask if you have ever seen them before?

(Witness looks at exhibits)

WITNESS (continuing)

Q. Yes. Thirty-three, exhibit thirty-three, was submitted as an exhibit by Investigator Hanstein at the same time and place. Exhibit thirty-four (34) is material that I removed from other exhibits submitted in this case, these are human hair.

Q. What exhibits did you remove State Exhibit thirty-four from?

A. This is exhibit Thirty-four (34)—I removed those from exhibit thirty-one (31) and thirty-two (32).

Q. And what were they?

A. Thirty-one (31) contained five items, six items, ladies peach colored panties, a lady's white bra, a pair of green strip outer pants, and a blue blouse,—and make a note here—they were generally distributed each of these and were bunches of human carcassized [sic] scalp hair which were not significantly different from the hair that was submitted in Exhibit thirty-three (33).

MR. OLDHAM: No further questions.

MR. FITZPATRICK: No questions.

WHEREUPON, the witness was excused.

MR. OLDHAM: That State Rest, [sic] your Honor.

THE COURT: Escort the jury out, please.

WHEREUPON, the jury was escorted from the court room to the jury room.

MR. FITZPATRICK: Let the record show that the defense makes a move for a directed verdict on the grounds that the state has failed to prove that this defendant did in fact commit murder of his wife. There is insufficient facts in the evidence, there is insufficient exhibits, there is nothing here to connect this man with the death of this woman.

MR. OLDHAM: To what I would say, your Honor, the corpus delicti has been shown, the wife of this defendant was murdered as alleged in the indictment, that his defendant was present at the time, one eye witness with him holding his wife's head outside the trailer, there are three or four witnesses including his mother and brother that state to the remarks that he made thereafter, we feel that there is sufficient prima facia case for this jury to consider the verdict.

THE COURT: Motion denied.

WHEREUPON, the jury was returned to the court room and seated in the jury box.

THE COURT: Ladies and gentlemen of the jury, we have come to a breaking point in the proceedings, and I am going, or rather arrangements have been made at Sweat's Resturant for your lunch, arrangements have been made for you to spend tonight at the motel which is directly across the street from Sweat's Resturant. We will take a break at this time and we will come back, you will be brought back in the jury room at Two o'clock this afternoon. Now, you all stay together for the remainder of this trial. I want to again admonish you that you are not to discuss the case among yourselves or with anyone else, nor permit anyone to discuss it in your presence. If anyone does attempt to talk to you about the case, report it to the court. Now, I want to again remind you that you are not to read any newspaper articles or listen to any radio accounts, or television accounts about the trial. This is extremely important, and you must do this. Escort the jury to the jury room.

WHEREUPON, the jury was escorted from the court room to the jury room.

WHEREUPON, the defendant was escorted to the holding room.

THE COURT: Court will be in recess until Two P.M.

WHEREUPON, court was in session after recess; defendant brought into court room and seated at defense table.

MR. FITZPATRICK: If it please the court, I would like to renew at this time my motion for directed verdict and show unto the Court the following: we have had testimony from one, two, three, four, five, six, seven, eight, nine witnesses, two of the witnesses were expert witnesses, one of the witnesses was an ambulance driver. The first two witnesses, Glenda Mae Demney and the gentleman referred to as Buckshot. There is nothing in the testimony of Glenda Mae Demney, there is nothing in the testimony of Buckshot, Nellie Merkerson—that her son made a statement to her roughly that he was beating his wife—David

Merkerson's statements was that 'Dan you have done it this time'.—He said 'yes, I did'—Susan Merkerson heard some thumping noise. Lloyd Shelton testified as great length about what he found in the trailer, the condition of the trailer and so forth. I say to this court that the State has wholly, wholly, failed to show premeditated design on the part of this defendant, and that this Court should direct a directed verdict as to first degree murder.

MR. OLDHAM: Your Honor, in rebuttal thereto, I think that the record will reflect there were eleven witnesses rather than nine. I think a check of the record that what was tesfieid [sic] to that from the second witness that the defendant had his wife outside of her mother's house that night by the hair, and said he was going to beat her, I think the evidence further shows that basically the admissions made to his mother and his half brother were admissions against self interest and guilt, I think both statements, the written statement made to Deputy Shelton and also the oral statement he made to Deputy Shelton shows that he made admission against interest, there is no evidence whatsoever that this man had anything to drink during this whole proceedings, your Honor, there is not one bit of evidence to take this away from first degree. The court has listened to the cause of death and the statements of the pathologist, and we feel the motion for directed verdict should be denied.

THE COURT: Motion denied.

WHEREUPON, the jury was returned to the court room and seated in the jury box.

MR. FITZPATRICK: Defense rest, your Honor.

[Closing arguments of counsel]

MR. FITZPATRICK: We have no objections to the instructions that are to be given and no objections to the forms of the verdict, your Honor.

MR. OLDHAM: State has no objections, your Honor.

WHEREUPON, court was in session, Nine fifty A.M., January 10, 1974; present for the State, Mr. G.G. Oldham, Mr. W.T. Green; present for the defendant, Mr. Charles Fitzpatrick, Mr. Michael Kovach; defendant present and seated at the defense table;

WHEREUPON, the jury was brought into the court room and seated in the jury box:

THE COURT: Ladies and gentlemen of the jury, you have listened carefully to the evidence and to the arguments of the attorneys. I now ask that you give the same careful attention to the law as determined by the court which you must apply to the facts as you find them from the evidence. You alone as jurors sworn to try this case must pass on the issue of facts, and your verdict must be based solely on the evidence or lack of evidence and the law as it is given to you by the court.

The defendant, Daniel Wilbur Gardner is charged with the crime of murder in the first degree in that on June 30th, 1973, in Citrus County, State of Florida, he did unlawfully and from a premeditated design kill Bertha Mae Gardner a human being by striking her with a blunt instrument, a more particular description to this grand jury unknown, did inflict in and upon the body of the said Bertha Mae Gardner did [sic] mortal wound and of which mortal wound the said Bertha Mae Gardner did die in violation of Florida Statute 782.04 (1).

This charge includes the lesser charges of murder in the second degree, murder in the third degree and manslaughter. The killing of one human being by another is called homicide. Every homicide falls within one of these four classes, justifiable homicide, excuseable homicide, murder in the first degree, second or third degree, and manslaughter.

The circumstances of each case determine whether a

homicide is justifiable, excusable, murder or manslaughter.

Justifiable homicide and excusable homicide are lawful; murder and manslaughter are unlawful and constitute violations of the criminal laws.

The essential elements of unlawful homicide, together with other matters that must be proved beyond and to the exclusion of every reasonable doubt in this case before there can be a conviction are: (1) the death of the person alleged to have been killed. (2) that such death was caused by the criminal act or agency of another; (3) that the deceased was killed by the accused.

The killing of a human being by any person is justifiable homicide and lawful, (1) when committed in resisting an attempt to murder such person or to commit any felony upon him, or upon or in any dwelling house in which such person shall be. (2) When committed in the lawful defense of such person, or his or her husband wife, parent, grandparent, mother-in-law, son-in-law, daughter-in-law, father-in-law, child, grandchild, sister, brother, uncle, aunt niece, nephew, guardian, ward, master, mistress, or servant, when there shall be reasonable ground to apprehend a design to commit a felony or do some great personal injury and there shall be imminent danger of such design being accomplished. (3) when necessarily committed in attempting by lawful ways and means to apprehend any person for any felony committed, or in lawfully suppressing a riot; or in lawfully kddping and preserving peace.

A homicide committed in self defense, that is, in the defense of the life of the accused or to protect his person from imminent danger of death or great bodily harm is a justifiable homicide and lawful.

Excusable homicide is homicide which is committed by accident and misfortune in doing any lawful act by lawful means with usual ordinary caution and without any unlawful intent, or by accident and misfortune in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat without any dangerous weapon being used and not done in a cruel or unusual manner.

Homicide is excusable and lawful if it is by accident and misfortune in the heat of passion upon any sudden and

sufficient provocation or upon a sudden combat, without— Ladies and gentlemen, I believe this is a duplication of the paragraph I have just read. Let me start again on this last paragraph. Homicide is excusable and lawful if committed by accident and misfortune in the heat of passion upon any sudden and sufficient prov[o]cation, or upon a sudden combat, without any dangerous weapon being used, and not done in a cruel or unusual manner. But if such killing is done by the use of a dangerous weapon, or in a cruel or unusual manner, it is manslaughter.

A sudden and sufficient provocation is something which would naturally and instantly produce in the mind of an ordinary person the highest degree of anger, rage, resentment or exasperation.

The heat of passion is anger, rage, resentment or exasperation so intense as to overcome or suspend the use of ordinary judgment and to render the mind of an ordinary person incapable of calm reflection.

A dangerous weapon is any weapon which, taking into account the manner in which it is used, is likely to produce death or great bodily harm.

Murder in the first degree is the unlawful killing of a human being when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed by a person engaged in perpetration of or in attempt to perpetrate any arson, rape, robbery, burglary, kidnapping, air craft pirarcy, or unlawful throwing, placing or discharging of a destructive device or bomb or which resulted from the unlawful distribution of heronine [sic] by a person over the age of seventeen years when such drug is proven to be the proximate cause of death by the user of being murder in the first degree.

A premeditated design to kill is a fully formed conscious purpose to take human life, formed upon reflection and present in the mind at the time of the killing. The law does not fix the exact period of time which must pass between the formation of the intent to kill and the carrying out of the intent. It may be only a short time and yet make the killing premeditated, if the fixed intent to kill was formed long enough before the actual killing to permit of some

reflection on the part of the person forming it, and that person was at the time of carrying out the intent fully conscious of a settled and fixed purpose to kill and of the results which would follow such killing. When such state of mind exists there is a premeditated design to kill, although the killing follows closely upon the formation of the intent.

The question of premeditated design is a question of fact to be determined by the jury from the evidence like every other material fact in the case. The law does not require that a premeditated design by [sic] proved only by direct and positive testimony. The existence of a premeditated design as well as its formation are operations of the mind, as to which direct and positive testimony cannot always be obtained, therefore, the law recognizes that it may be proved by circumstantial evidence. It will be sufficient proof of such premeditated design if the circumstances attending the homicide and the conduct of the accused convinces you beyond a reasonable doubt of the existence of such premeditated design at the time of the homicide.

If a person has a premeditated design to kill one person and in attempting to kill that person actually kills another whom he did not intend to kill, he is nonetheless guilty of murder in the first degree.

The killing of a human being in committing or in attempting to commit any arson, rape, robbery, burglary, kidnapping, air craft pirarcy, or the unlawful throwing, placing of a destructive device or bomb, or which resulted from the unlawful distribution of heroin by a person over the age of seventeen years when such drug is proven to be the proximate cause of the death of the user shall be murder in the first degree even though there is no premeditated design or intent to kill.

The punishment for murder in the first degree is life or death as may be determined by the court in a later proceeding.

Murder in the second degree is the killing of a human being by the perpetration of an act imminently dangerous to another and evincing a depraved mind regardless of human life although without any premeditated design to effect the death of any particular individual or when committed in the perpetration of or attempt to perpetrate any arson, rape, robber, burglary, kidnapping, air craft pirarcy, or unlawfully throwing, placing or discharging of a destructive device or bomb. The punishment by law of murder in the second degree is imprisonment in the state prison for life, or for such term as may be determined by the court.

Murder in the third degree is the unlawful killing of a human being when perpetrated without any design to effect death by a person engaged in the perpetration of or the intent to perpetration any felony other than arson, rape, robbery, burglarly, kidnapping, air craft pirarcy [sic], or unlawful throwing, placing or discharging of a destructive device or bomb. Punishment provided by law for murder in the third degree is imprisonment in state prison for a term of years to be fixed by the court, but not exceeding fifteen years.

Manslaughter is the killing of a human being by the act, procurement, or culpable negligence of another in cases where such killing shall not be justifiable or excusable homicide or murder.

Negligence is the failure to use reasonable care. Reasonable care is that degree of care which a reasonably careful person would use under like circumstances. Negligence may consist either in doing something that a reasonably careful person would not do under like circumstances or in failing to do something that a reasonable careful person would do under like circumstances. Culpable negligence is the conscious doing of an act or following a course of conduct which any reasonable person would know would likely result in death or great bodily injury to some other person when this is done without the intent to injure any person but with utter disregard for the safety of others. The punishment provided by law for manslaughter is imprisonment in state prison for not more than fifteen years.

To summarize the essential elements of an unlawful homicide which must be proved beyond a reasonable doubt in this case before there can be a conviction of any offense, are as follows: (1) that Bertha Mae Gardner is in fact dead; (2) that she was killed by the defendant; (3) that the killing was wrongful and by the means stated in the indictment; (4) that the killing was neither justifiable or excusable

homicide. If these elements are established, then it would be necessary for you to determine the degree of the unlawful homicide. If the defendant in killing the deceased acted from a premeditated design to effect the death of the deceased, or some other human being, or in the perpetration of or in the attempt to perpetrate arson, rape, robbery, burglary, kidnapping, air craft pirarcy [sic], or unlawful throwing, placing, or discharging of a destructive device or bomb or which resulted from the unlawful distribution of heroin by a person over the age of seventeen years of age when such drug is proven to be the proximate cause of the death of the user, he should be found guilty of murder in the first degree. If the killing was not from a premeditated design to effect the death of any human being, but was in the perpetration of an act imminently dangerous to another and evincing a depraved mind regardless of human life although without any premeditated design to effect the death of any particular individual, or when committed in the perpetrating act or in the attempt to perpetrate any arson, rape, robbery, burglary, kidnapping, air craft pirarcy [sic], or unlawful throwing, placing, or discharging of a destructive device or bomb, he should be found guilty of murder in the second degree.

If the killing took place while the defendant was engaged in the commission of a felony other than arson, rape, robbery, burglarly, kidnapping, air craft pirarcy, or unlawful throwing, placing or discharging of a destructive device or bomb, the defendant should be found guilty of murder in the third degree.

If the killing were by act, procurement, or culpable negligence of the defendant and was not murder in any degree or justifiable or excusable homicide, the defendant should be found guilty of manslaughter.

If any of the essential elements of homicide have not been proved beyond a reasonable doubt, the defendant should not be found guilty.

If you find the defendant guilty of murder in the first degree, then at a later proceeding, you will render an advisory sentence to the court recommending that the defendant be sentenced to life or death. The court may accept such

recommendation and sentence the defendant as recommended, or it may under such circumstances reject such recommendations and sentence the defendant to either life or death.

The defendant has entered his plea of not guilty. The effect of this plea is to require the State to prove each material allegation of this indictment beyond and to the exclusion of every reasonable doubt before the defendant may be found guilty.

It is to the evidence and to it alone that you are to look for such proof.

It is not necessary that the State prove that the crime was committed on the exact date alleged in the indictment. A conviction of murder in the first degree may be had upon proof that the crime was committed at any time prior to filing of the indictment, but if the evidence does not justify conviction of murder in the first degree then before there can be a conviction of any lesser included offense, you must find that the lesser included offense was committed within two years immediately prior to the filing of this indictment.

Proof that the crime was committed in Citrus County named in the indictment need be only with reasonable certainty. It need not be proved beyond a reasonable doubt.

The defendant in every criminal case is presumed to be innocent until his guilt is established by the evidence to the exclusion of and beyond every reasonable doubt.

Before the presumption of innocence leaves the defendant, every material allegation of the indictment must be proved by the evidence to the exclusion of and beyond every reasonable doubt. The presumption accompanies and abides with the defendant as to each and every material allegation in the indictment through each stage of the trial until it has been overcome by the evidence to the exclusion of and beyond a reasonable doubt.

If any of the material allegations of the indictment is not proved to the exclusion of and beyond every reasonable doubt, you must give him the benefit of the doubt and find him not guilty, but if you find from the evidence beyond and to the exclusion of every reasonable doubt that all the ma-

terial allegations of the charge have been proved then you must find him guity.

To overcome the presumption of innocence of the defendant and establish his guilt, it is not sufficient to furnish evidence merely tending to prove guilt, nor to prove a mere probability of guilt, but proof of guilt to the exclusion of and beyond every reasonable doubt is absolutely necessary.

You must carefully, impartially and conscientiously consider, compare, and weigh all the evidence, and if after doing this you feel that your understanding, judgment and reason are well satisfied and convinced to the extent of having a full, firm and abiding conviction that the charge has been proved to the exclusion of and beyond a reasonable doubt, it is your duty to find the defendant guilty.

A doubt which is a mere possible doubt a speculative, imaginary or forced doubt, is not a reasonable doubt, and for the reason that everything relating to human affairs is open to some doubt of this kind, such a doubt must not influence the jury to return a verdict of not guilty where they have an abiding conviction of guilt. On the other hand, if, after carefully considering, comparing, and weighing all the evidence, there is not an abiding conviction of guilt, or, if, having a conviction it is one which is not stable but one which wavers and vacillates, then the charge is not proved beyond a reasonable, beyond every reasonable doubt and you must find the defendant not guilty because the doubt is reasonable.

It is to the evidence introduced upon this trial and to it alone that you are to look for such proof.

A doubt which is not suggested by, or does not arise from the evidence or the lack of evidence, is not a reasonable doubt and should never be considered. In other words you have no right to go outside the evidence for doubts of any kind; however, a lack of evidence or an insufficiency of evidence may create a reasonable doubt.

You are the sole judges of the weight and sufficiency of the evidence and of the credibility of the witnesses.

You should reconcile any conflicts you find in the evidence without inputing untruthfulness to any witnesses. If you cannot reconcile any conflicts you find, then it is your duty

to reject the evidence you find to be unworthy of belief and to accept and rely upon the evidence you find worthy of belief.

In determining the believability of any witness and the weight to be given his testimony, you may properly consider the demeanor of the witness while testifying, his frankness or lack of frankness, his intelligence, his interest if any in the outcome of the case, the means and opportunity he had to know the facts about which he testified, his ability to remember the matters about which he testified, and the reasonableness of his testimony considered in the light of all the evidence in the case.

From these and all other facts and circumstances in the evidence you must reach your own independent conclusions and in so doing you should use the same common sense, sound judgment and reason that you use in everyday life.

An expert witness is one who by education training or experience, has become expert in any art, science, profession, business or calling. An expert witness is permitted to give his opinion as to matters in which he is an expert, and may also state the reasons for his opinion.

You should consider each expert opinion received in evidence and give it the weight you think it deserves, and you may reject it entirely if you find that the alleged facts upon which it is based have not been proved or that the reasons given in support of the opinion are not sound.

If you find there is an absence of evidence suggesting a motive for the defendant to commit the crime charged, the absence of such motive is a circumstance which you should consider. However, proof of motive is never necessary to a conviction.

In every criminal proceeding a defendant has the absolute right to remain silent. At no time is it the duty of a defendant to prove his innocence. From the exercise of a defendant's right to remain silent a jury is not permitted to draw any inference of guilt, and a defendant's failure to take the witness stand must not be considered in any manner as admission of guilt, nor should his failure to take the witness stand influence your verdict in any manner whatsoever.

A statement made out of court by a person charged with crime should be received and acted upon with great caution. It cannot be considered as evidence against him unless it was freely and voluntarily made. Any statement made because of or induced by any threat, promise or other inducement held out to the defendant by anyone was not freely and voluntarily made and should be wholly disregarded.

A statement voluntarily made should be given fair and unprejudiced consideration with due regard to the time and circumstances under which it was made, its harmony or inconsistency with other evidence as well as the motives shown by the evidence to have influenced the making of the statement. You may believe any part of such a statement which you find to be true and reject those parts which you find to be untrue.

Circumstantial evidence is legal evidence and a crime or any fact to be proven may be proved by such evidence. A well-connected chain of circumstances is as conclusive in proving a crime or fact as is positive evidence. Its value is dependent upon its conclusive nature and tendency.

Circumstantial evidence is governed by the following rules: (1) The circumstances themselves must be proved beyond a reasonable doubt. (2) The circumstances must be consistent with guilt and inconsistent with innocence. (3) The circumstances must be of such a conclusive nature and tendency that you are convinced beyond a reasonable doubt of the defendant's guilt or the fact to be proved.

If the circumstances are susceptible of two equally reasonable constructions, one indicating guilt and the other innocence, then you must accept that construction indicating innocence.

Circumstances which standing alone are insufficient to prove or disprove any fact may be considered by you in weighing direct and positive testimony.

You are to disregard the consequences of your verdict. You are empaneled and sworn only to find a verdict based upon the law and the evidence. You are to lay aside any ideas that you may have about the wisdom or lack of wisdom, of any particular law or procedure touching upon this

case. You are to consider only the testimony that you have heard along with the other evidence which has been received and the law as given to you by the Court.

You are to lay aside any personal feeling you may have in favor of or against the State, and in favor of or against the defendant. It is only human to have personal feeling or sympathy in matters of this kind, but any such personal feelings or sympathy has no place in the consideration of your verdict.

You are not to be concerned with the imposition of any penalty in the event you reach a verdict of guilty. Just as the determination of the guilt or innocence of the accused rests solely and absolutely with you, so also does the determination of the extent of punishment within the limits prescribed by the law, test solely and with the Court.

When you have determined the guilt or innocence of the accused you have completely fulfilled your solemn obligation under your oaths.

Provisions for probation, parole, pardon, or reduction of sentence of convicted persons are a part of the laws of this State. These laws are administered by public officials as authorized by the law.

Whatever verdict you render must be unanimous. The verdict must be the verdict of each juror as well as the jury as a whole.

The indictment charges the crime of murder in the first degree which includes as a matter of law the lesser crimes of (1) Murder in the Second Degree, (2) Murder in the Third Degree, and (3) Manslaughter.

You may find the defendant guilty as charged in the indictment or guilty of such lesser included crime as the evidence may justify. You may return one of the following verdicts: (1) Not guilty; (2) Guilty of Murder in the first degree as charged in the indictment; (3) Guilty of Murder in the Second Degree; or Murder in the Third Degree; or Manslaughter.

If you return a verdict of guilty, it should be for the highest offense which has been proved beyond a reasonable doubt. If you find that no offense has been proved beyond a

reasonable doubt, then of course your verdict must be not guilty.

I have some verdicts for you here which I will read to you, the first one is, we the jury find the defendant Daniel Wilbur Gardner guilty as charged in the indictment, murder in the first degree, so say we all, dated this blank day of January, 1974, and a place for your foreman to sign. The next verdict is: we the jury find the defendant Daniel Wilbur Gardner guilty of murder in the second degree, so say we all, dated this blank day of January 1974, and a place for your foreman to sign. The next verdict is: we the jury find the defendant Daniel Wilbur Gardner guilty of murder in the third degree so say we all, dated this blank day of January 1974, and a place for your foreman to sign. The next verdict is: we the jury find the defendant Daniel Wilbur Gardner guilty of Manslaughter so say we all, dated this blank day of January, 1974, and a place for your foreman to sign. The next verdict is: we the jury find the defendant, Daniel Wilbur Gardner, not guilty, so say we all, dated this blank day of January 1974, and a place for your foreman to sign.

Now, you are here only to determine the guilt or innocence of the defendant. So if the evidence convinces you beyond every reasonable doubt of the guilt of the defendant then you should find him guilty even though you may believe one or more persons are also guilty.

The defendant is not on trial for any act or conduct not charged in the indictment or included within the lesser offenses and you must consider the evidence only as it relates to this charge.

Nothing that I have said in these instructions, or at any other time during the trial, is any intimation whatever as to what verdict I think you should find. The verdict is the sole and exclusive duty and solemn responsibility of you the jury and neither the Court nor anyone else can help you in performing that duty.

It is your solemn obligation not to be swayed or influenced in any manner by any sympathy or prejudice that you have either for or against the defendant or for or against the State. In arriving at your verdict you must be

guided solely by the evidence and these instructions, and you cannot let any outside influence enter into your deliberations on your verdict.

If after having heard all the evidence and the law as given you by the Court, you have any reasonable doubt as to the defendant's guilt of any crime within the charge you must find him not guilty. However, if you are satisfied beyond every reasonable doubt of his guilt it is your duty to find him guilty of such crime as to which you are satisfied of his guilt beyond every reasonable doubt.

If while you are deliberating you wish to examine—I will give to the bailiff to deliver to you all of the exhibits which have been introduced into evidence, so that you may take them into the court room with you.

Your first duty upon retiring will be to elect a foreman to preside over your deliberations and sign your verdict, when you have arrived at one.

Mr. Bailiff, if you would get the verdicts and instructions which I am going to deliver to the jury and a copy of the indictment.

I would like to ask the State and the Defendant if they have any additions or corrections to the instructions as given?

MR. GREEN: None, your Honor.

MR. KOVACH: None, your Honor.

THE COURT (continuing) If you would deliver this to the jury—

(The court hands exhibits, instructions and indictment to bailiff) Forms of verdicts, copy of indictment, instructions, and all exhibits introduced into evidence.

THE COURT: The two alternates are now excused.

WHEREUPON, the jury retired to the jury room at 10:33 A.M.

THE COURT: Escort the defendant to the holding room.

(Whereupon, the defendant was escorted to the holding room)

THE COURT: Court is in recess until the jury returns.

WHEREUPON, the jury returned to the court room at 12:20 P.M., (Defendant was seated at defense table with counsel)

THE COURT: The bailiff advises me that members of the jury have a question that they would like to ask the court?

MR. FOREMAN: Your Honor, I was elected foreman—we would like to have certain testimony read to us to decide the degree. First one would be the doctor's statement—

THE COURT: Just a minute, gentlemen—

MR. FOREMAN: The second is the conversations between the two brothers, and the third item is Lloyd' Shelton's testimony.

THE COURT: You are requesting that all of the testimony of those three witnesses be read back to you?

(At the bench)

MR. PIERCE: Let the record reflect that the public defender object to the re-hearing of the testimony, of any testimony.

MR. OLDHAM: The complete testimony of the witnesses will be heard by the jury rather than just statements or parts of testimony of each witness, the entire testimony of those three witnesses will be re-played for the jury

IN OPEN COURT:

THE COURT: Now, let me get it straight just which testimony it is you wish—the testimony of the Doctor, and—

MR. FOREMAN: The conversation between the two brothers.

THE COURT: All right, and the testimony of Lloyd Shelton. This will take the court reporter a little while to get that portion of the transcript picked out, so I am going to send you back to the jury room and we will order your lunch.

WHEREUPON, the jury was returned to the jury room.

WHEREUPON, the defendant was returned to the holding room.

THE COURT: Court is in recess.

WHEREUPON, court was in session, 2:00 P.M., present for the state, Mr. W.T. Green; present for the defendant, Mr. Michael Kovach; defendant seated at table with defense counsel.

WHEREUPON, the jury was returned to the court room and seated in the jury box.

WHEREUPON, the recorded testimony of the witness DAVID MERKERSON was played to the jury. (See page 200, line 10)

THE COURT: Mrs. Davis, do you certify that the testimony of David Merkerson that you have just played to the jury is a correct reproduction of the testimony actually given by him during this trial as verified by your shorthand notes?

COURT REPORTER: Yes, sir.

WHEREUPON, the recorded testimony of the witness, LLOYD SHELTON was played to the jury. (See page 216, line 5)

THE COURT: Mrs. Davis, do you certify that the testimony of LLOYD SHELTON that you have just played to the jury is a correct reproduction of the testimony actually given by him during this trial as verified by your shorthand notes?

COURT REPORTER: Yes, sir.

WHEREUPON, the recorded testimony of the witness, DR. WILLIAM H. SHUTZE was played to the jury, the record being stopped during the portion while jury had been removed from the court room, resumed when jury was returned to the court room. (See page 252, line 1)

THE COURT: Mrs. Davis, do you certify that the testimony of DR. SHUTZE that you have just played to the jury is a correct reproduction of the testimony actually given by him during this trial as verified by your shorthand notes?

COURT REPORTER: Yes, sir.

THE COURT: Members of the jury, do you feel that this answers your quesions that you had?

JURORS: Yes, sir.

WHEREUPON, the jury was escorted to the jury room, at 3:15 P.M.

WHEREUPON, the defendant was escorted to the holding room.

THE COURT: Court will be in recess until the jury returns.

WHEREUPON, court was in session, 4:05 P.M.; present for the state, Mr. G.G. Oldham, Mr. W.T. Green; present for the defendant Mr. Charles Fitzpatrick, Mr. Michael Kovach; defendant present and seated at defense table.

WHEREUPON, the jury was returned to the court room:

THE COURT: Mr. Foreman, has the jury arrived at a verdict?

FOREMAN: We have, sir.

THE COURT: Hand it to the bailiff, please?

(Foreman hands paper to bailiff, bailliff hands paper to the Court)

THE COURT: Publish the verdict.

DEPUTY CLERK: In the Circuit Court of the Fifth Judicial Circuit of the State of Florida, in and for Citrus County, Criminal Case number 73-132, CA-01, State of Florida vs. Daniel Wilbur Gardner, defendant, verdict: We the jury find the defendant, Daniel Wilbur Gardner, guilty as charged in the indictment of Murder in the First Degree, so say we all, dated this the 10th day of January, 1974, signed Joseph F. Schoen, foreman of the Jury.

THE COURT: Based on the verdict, the court hereby adjudicates the defendant guilty of Murder in the First Degree. Now, members of the jury, you have just completed the first phase of this trial. We will now commence the second phase or the sentencing proceeding during which time aggravating circumstances and also mitigating circumstances can be presented to you, the jury, to assist you in rendering an advisory sentence to the court.

MR. OLDHAM: Mr. Green will represent the State, your Honor.

MR. FITZPATRICK: Mr. Kovach will represent the defendant.

MR. GREEN: If your Honor please, certain photographs have been previously marked for identification, photograph marked for identification number eight (8), another photograph marked for identification number six (6), and photograph marked number one (1). We would move that each of these photographs be introduced for purposes of showing to

the jury at this time for the purpose of showing aggravating circumstances as provided by law.

MR. KOVACH: To which the defendant would strongly object, your Honor, on the basis that there are already photographs in evidence that are admissable [sic] and usable under this circumstances of the particular portion of the case, and there would be no value gained by further submission of potentially inflammatory material.

THE COURT: Motion denied.

(Whereupon exhibits were marked as evidence)

MR. KOVACH: I would like to extent the argument [sic], if the Court would grant me a moment, in that it is conceivable that the appropriative [sic] value of the evidence being submitted would be grossly exaggerated in that [it] would not represent the body of the deceased as it was in fact at the time of the commission of the crime but rather that it would be conceivable that the evidence would show the pictures that are being proferred would be taken, would be pictures that were taken in the midst of the autopsy performed on the deceased and therefore marks or conditions of the body at the time are not the condition of the body at the time of the crime and as a consequence it would be grossly prejudicial to the defendant's plea for mercy in this matter.

MR. GREEN: In rebuttal, your Honor, we would point to the court section 72-724, section One, which I would like to read a portion to his Honor.—procedure shall be conducted before the jury empanneled [sic] for that purpose, in the proceeding, evidence may be presented as to any matter that the court deems relevant and shall include all factors, and we shall be presenting sub-section H, that the capital felony was especially heinous, atrocious or cruel.

MR. KOVACH: Your Honor, in rebuttal, that goes to the heart of my argument, in that the evidence that is being submitted is not evidence that existed at the time of the crime, but is in fact potentially or potential mutalation [sic] to the body in an attempt to perform the medical autopsy, and is severally prejudicial.

THE COURT: Let me see the pictures.

(Pictures handed to the Court)

THE COURT: State Exhibit marked for identification number eleven (11),—the defendant's motion is granted as to exhibit eleven and this will not be shown.

MR. KOVACH: Thank you, your Honor.

MR. GREEN: I would like to show the jury these two photographs, your Honor, that have been marked.

(Jurors examine photograph)

MR. GREEN: If your Honor please, the State will place no additional evidence at this time.

MR. KOVACH: May it please the court, the defense will call Daniel Gardner.

WHEREUPON, DANIEL WILBUR GARDNER having been sworn, testified as follows:

DIRECT EXAMINATION BY MR. KOVACH:

Q. State your name please for the jury?
A. My name is Daniel Wilbur Gardner.
Q. What is your age, sir?
A. My age is thirty-nine years of age.
Q. How many children do you have, sir?
A. Have four small children.
Q. Give their names and ages, please?
A. I have Melanie—Gardner, approximately five and a half years old, I have Daniel Wilbur Garner, II, approximately four years old, I have Michelle Lynn Gardner, approximately three years old, and I have Kimberly Ann Gardner, approximately eleven moths old.
Q. Mr. Gardner, the day before this situation occurred, or let's say in the morning, the morning when you woke up before all of this occurred, would you attempt to retrace your steps for this court and this jury throughout the day?
A. I will do my best.
Q. Your Honor, before we start, may we waive our normal question and answer routine temporarily and allow the defendant to speak at will?
A. On the morning of the 29th of June, I woke up in the morning, my wife woke me up, I had me a cup of coffee, asked me if I was ready to get up, I guess it was about, I would say Seven o'clock. We got up—I'm sorry—I drank

my coffee in bed, I heard the kids in there, having their breakfast at the table, I finished my coffee, and went into the living room, and I sat on the couch, finished my coffee, and she asked me if I wanted some breakfast and I said 'no, I didn't want any', I just had some coffee, so . . .
Q. Mr. Gardner, did anyone come to your house that morning;
A. Yes.
Q. Who?
A. Mr. Wayne Richie.
Q. About what time?
A. Approximately Ten o'clock that morning.
Q. Did you leave the house with Mr. Richie?
A. Yes, sir.
Q. Did you have anything alcoholic to drink that morning while you were at home?
A. Not while I was home, no, sir.
Q. Did you leave with Mr. Richie?
A. Yes, sir.
Q. Where did you go?
A. We got in his car, and we drove out I believe it was to the Sugar Mill Tavern, Mr. Richie's girl friend was bar maid there.
Q. Did you have anything to drink at the Sugar Mill?
A. Yes, I believe we did.
Q. Can you tell the jury how much you had to drink?
A. I would say two shots of Canadian Club.
Q. How long did you stay at the Sugar Mill?
A. We stayed there about an hour.
Q. Did you leave with Mr. Richie?
A. Yes.
Q. Where did you go?
A. We rode back in to Homosassa and we stopped at a Jiffy Store, we bought a six pack of beer.
Q. About what time was this?
A. I would say about Eleven fifteen.
Q. In the morning?
A. Yes.
Q. At this point had you had anything to eat?
A. No, sir.

Q. Did you drink any part of that six pack of beer?
A. Yes, sir.
Q. Do you recall how much?
A. I drank three cans.
Q. Where did you go after you purchased the beer?
A. We went riding, down around town and we went down to see my cousin, Jerry Oliver, was in the yard, so we stopped the car, and we got out to go see what they were doing.
Q. Did you have anything to drink while you were there?
A. Yes, sir.
Q. What did you drink while you were there?
A. I would say two beers.
Q. Was this still from what you bought at the Jiffy Store?
A. No, sir, one of them was and one of them they had it.
Q. Approximately how long did you stay there?
A. I would say about thirty minutes.
Q. All right. Did you leave there with Wayne Richie?
A. Yes.
Q. Anyone else?
A. Yes.
Q. Who?
A. Jerry Oliver, Wayne Richie and I.
Q. Where did you go?
A. We rode down to the end of what they call Mason Creek Road, Homosassa.
Q. Did you have anything to drink while you were there?
A. Yes, sir.
Q. What was that?
A. Vodka.
Q. One shot?
A. We had approximately three shots of Vodka each.
Q. Straight?
A. No, sir, we had orange juice mixed with it.
Q. Was this noon time?
A. Around noon time.
Q. What did you do then?
A. We went back up towards town, with intention of going back to the Sugar Mill. Jerry Oliver suggested we

drop him off at his car. We dropped him off at his car, and Wayne Richie and I proceeded back to the Sugar Mill.
Q. Did you have anything to drink when you went back to the Sugar Mill?
A. Yes, sir, best of my memory we had one drink there.
Q. What was that?
A. Canadian Club.
Q. Did you stay at the Sugar Mill all afternoon?
A. No, sir.
Q. Where did you go from there?
A. From there we went back into Homosassa, back to the Jiffy Store. He bought another six pack of beer. We opened one there, and we decided to run to Crystal River.
Q. Where did you go in Crystal River?
A. Well, we went to the Tangerine Lounge, but we did not go inside, as I recall. We decided to come back down to Homosassa Springs, to a place called 'My Brother's Place', a tavern.
Q. Had you completed drinking the six pack by the time you got back to 'My Brother's Place'?
A. From what I remember, we had drank four out of that six pack. In Crystal River we stopped at the Service Station, and we had two beer and they were hot and we decided to buy a cold six pack.
Q. At My Brother's Place?
A. No, sir, at the service station.
Q. Did you drink some of those before you got back to 'My Brother's Place'?
A. We drank one each, on the way.
Q. What did you drink when you got there?
A. We went in and ordered a beer.
Q. How long did you stay at 'My Brothers Place'?
A. I would say most of the evening.
Q. Was it dark by the time you left there?
A. I don't have a true mind on that but it seems to me like it was late in the evening.
Q. Did you have anything to eat?
A. No, sir.
Q. It was late in the evening and you still hadn't had anything to eat all day, is that correct?

A. To the best of my knowledge, it seems like it was dark. We hadn't had anything to eat.

Q. How did you get back to the Sugar Mill?

A. Wayne Richie and myself drove back to the Sugar Mill.

Q. Were you driving during this day?

A. No, sir, I was riding.

Q. Would you break in your trend just a moment and tell us why you had gone out with Wayne Richie that day?

A. He and I had gone the day before and inquired about a job, we had gotten a job and we was to go to work the following Monday at Seven o'clock.

Q. Was this drinking trip, was this any thing that was done in anger?

A. No, sir.

Q. Were you celebrating the acquisition of a job?

A. Had that tendency.

Q. So you got back to the Sugar Mill?

A. Yes, sir.

Q. How much did you have to drink while you were there at the Sugar Mill?

A. I can remember two or three drinks of Canadian Club whiskey.

Q. Do you have any idea what time you arrived at the Sugar Mill?

A. No, sir, I would say somewhere between dark and nine o'clock.

Q. When did you first see your wife that evening?

A. I saw my wife when she came through the door of the Sugar Mill tavern.

Q. Do you know what time that was?

A. Best of my knowledge it was about ten forty-five or Eleven o'clock.

Q. Did you greet your wife?

A. Yes.

Q. Did you sit down and talk to your wife?

A. Yes, sir.

Q. Could you tell us what you talked about? Was there an argument between you?

A. No, sir. No arguments.

Q. Did you buy your wife a drink?

A. Yes, sir.

Q. Did you buy your wife more than one drink?

A. I think we had a couple after she came in.

Q. Do you know what type of liquor she was drinking?

A. Best of my knowledge, I was drinking Canadian Club and Coke.

Q. And her?

A. I think she was drinking Segram and Seven. I believe it was.

Q. When she first came in the Sugar Mill, that was the first time you had seen her since early that morning, is that correct?

A. Yes, sir.

Q. Were you able to tell whether or not she had been drinking at that time?

A. To me, I knew my wife very well, and to me she looked like she had drank something. How much I don't know. She looked to me like she had drank something.

Q. Did you and your wife get into any argument at all?

A. No, sir.

Q. Was—excuse me, what time did you leave the bar?

A. To the best of my knowledge, it was around Eleven thirty.

Q. Who decided to leave, you or your wife?

A. I did.

Q. Did your wife come willingly?

A. Yes, sir.

Q. Was there any discussion about going home?

A. No, sir, I asked her was she ready to go home, it was close to closing time, and she said 'when ever you are'.

Q. Did you take any liquor home with you?

A. Yes, sir, I remember something about buying some liquor.

Q. Do you know what you bought?

A. I believe it was a Fifth of Canadian Club whiskey.

Q. Did you buy that as you were leaving?

A. No, sir, it seems like I had bought this before, before we left.

Q. Was it full when you left?

A. To my knowledge, yes.
Q. Do you recall having broken the seal on this?
A. No, sir, I do not recall.
Q. How did you get home? Who took you home?
A. I believe Wayne Richie took me home.
Q. Who was in the car with you and wife?
A. To the best of my knowledge, a young boy.
Q. Do you know his name?
A. Calvin—Calvin something.
Q. Your wife with you?
A. Yes, sir.
Q. Were you drinking on the way home?
A. I believe we had a drink, yes, sir.
Q. Did you and your wife have any discussion on the way home?
A. I don't remember.
Q. Do you recall anything that happened on the way home?
A. No, sir, only thing I remember, when we got there in front of the house, me telling Wayne Richie let's have a night cap from the bottle.
Q. Is that when the bottle got opened or was it before that?
A. I don't remember.
Q. No argument between you and your wife?
A. Not that I recall.
Q. Did you have, in fact, a night cap with Wayne Richie?
A. Yes, sir.
Q. Did your wife go in the house willingly?
A. She stayed there until we had the drink, and she and I both got out of the car, but as far as going in the house, yes, sir, she went in willingly.
Q. There was no argument?
A. No, sir.
Q. Did an argument occur after you got in the house?
A. The only argument we had when we got in the house, that I can recall, was about my children.
Q. Were your children at home when you got home?
A. No, sir.
Q. Did you ask your wife where the children were?

A. Yes, sir.
Q. Did she tell you?
A. No, sir.
Q. What did she tell you?
A. When I first asked her, I said 'who has got the children?', and she asked me wouldn't I like to know, and I said 'yes, I certainly would', and she said 'well, why don't you find out', and then I asked her, I said 'does your mother have the children', 'have our children', and she said 'well, why don't you go find out', so I said 'O.K., I will'. . .
Q. Did you in fact go next door to see if your mother-in-law had your children?
A. Yes, sir, I did.
Q. Did she have the chidlren?
A. No, sir.
Q. Did you have an argument with your wife at this point?
A. No, sir.
Q. Do you recall any part of what happened from this part forward?
A. You mean—back?
Q. You went over to see Mrs. Demeney . . .
A. Yes, sir.
Q. Had a discussion with her?
A. No, sir. I wouldn't call it a discussion.
Q. Well, it was a conversation, or argument?
A. Yes, sir.
Q. Did you then go back to the house? to your trailer?
A. Not at that time, no, sir.
Q. Was your wife with you when you had this argument with your mother-in-law?
A. She had come up afterwards. During the time, she had come up.
Q. Was she dressed?
A. No, sir.
Q. Did she have any clothes on at this time?
A. No, sir.
Q. Did you take your wife back home?
A. No, sir.
Q. Did you try?

A. I don't remember, but at that time, I know I didn't take her back home.

Q. Did you stay out in the yard with your wife?

A. I don't remember, sir.

Q. Do you recall anything further that night?

A. I would like to, to tell what happened at my mother-in-law's door.

Q. We are talking about what transpired after you left—after you left your mother-in-law's door.

A. The next thing I remember, my wife and I was on the road, and she was—from what I remember—she was fussing with me, and I had her by the arm, and I said 'come on, let's go back to the house', and she snatched her arm away from me, and when she done this, she fell on the lime rock road . . . she stumbpled [sic] around and tried to get up and I tried to help her up, and every time I would try to help her up, she would snatch away from me and tell me to leave her alone, she would get up by herself.

Q. Were you fighting with your wife?

A. No, sir.

Q. Did you at any time this night fight with your wife?

A. No, sir.

Q. Actually argue with her about something?

A. The only argument we had was about my children.

Q. Did she ever tell you where your children were?

A. No, sir.

Q. Did your argument continue after you got her back in the house? About where the children were?

A. No, sir.

Q. Did you finally get her back in the house?

A. Yes, sir.

Q. After you got her in the house, did you put her to bed?

A. No, sir, she had fell in the yard . . .

Q. What?

A. From the road to the house, she fell out in the yard. The yard is dirt, and and I grabbed her, when she fell, I grabbed and tried to get her up, and she was fussing with me, snatching away from me, told me she could do it herself, and then she was just laying there and and seems to

me like then, . . and then Is when I called Mr. Buckshot and asked him if he would come help me to get my wife in the house, she was acting too crazy . . .

Q. Did he help you get her in the house?

A. He tried to help me get her in the house, yes, sir.

Q. You did ultimately get her in the house?

A. Yes, sir.

Q. Did you make any attempt to try to clean her up?

A. Yes, sir.

Q. Was she in fact wounded as a result of these falls in the yard?

A. Yes, sir.

Q. Did you in fact put your wife to bed? Or did she go on her own?

A. She walked on her own to bed.

Q. Did you have any difficulty in getting her cleaned up?

A. Yes, sir, I did.

Q. Did this difficulty include the possibility that she might fall?

A. Yes, sir.

Q. More than once?

A. Yes, sir.

Q. Where did you clean her up?

A. In the bath tub.

Q. Do you recall ever having beaten your wife that night?

A. No, sir, I don't.

Q. Do you recall anything more occurring that night?

A. Yes, sir, I do.

Q. Did anything occur while she was in bed?

A. Yes, sir.

Q. Did, in fact, she want to continue this argument?

A. Yes.

Q. Did you attempt to stop the argument?

A. Sir, the argument was that she didn't want to go to bed, I think, at the time and that was what we was arguing about.

Q. Did you attempt to restrain her and make her stay in bed?

A. No, sir.

Q. Did you at any time hold on to her hair in an attempt to hold her head down on the pillow?

A. No, sir.

Q. Would she have been able to get up had she wanted to?

A. I would think so, yes.

Q. Did you beat her while she was on that bed?

A. No, sir, I did not.

Q. Did you hit her?

A. I remember hitting her with the back of my hand.

Q. Hitting her face?

A. No, sir.

Q. Hitting her body?

A. Yes, sir.

Q. Was this done in anger?

A. No, sir.

Q. Did you have—did you understand when striking her that this might have occurred?

A. No, sir.

Q. Did you understand what was happening?

A. No, sir.

Q. Can you tell this Court how many drinks you think you had during the course of that entire day?

A. No, sir, I couldn't attempt—

Q. Was the fact that you were not able to find your children when you got home present a serious problem to you?

A. Do you mean if there was an argument?—I don't understand the question.

Q. When you got home and your wife refused to tell you where your children were, that is what you testified to, and in fact told you to go find out where they were best you could, is that correct?

A. Yes, sir.

Q. Did that seriously disturb you or anger you or create any problems for you? Mental problems?

A. No, sir.

Q. Did it create enough of a problem that you were not in control of your mind at that time?

A. No, sir.

Q. Do you think that the fact that your wife continued to

argue with you or fuss at you and refuse to tell you where your children were, did this create an argument to continue for any length of time?—that is that maybe she antagonized you some?

Q. I don't remember, sir,—I don't remember.

Q. Did you understand that by slapping your wife with the back of your hand the possible possibility that you could kill her?

A. No, sir, I did not understand anything at that time.

Q. Did you ever have an intent to kill your wife?

A. No, sir.

Q. Was you aware of what was going on that night after you got home, now in that respect, were you aware of . . .

A. No, sir. I wasn't in my mind, no sir.

MR. KOVACH: That's all I have at this time.

CROSS EXAMINATION BY MR. GREEN:

Q. May it please the court—Mr. Gardner, it seems that you have excellent memory of the facts and circumstances and total detail of what occurred on that afternoon and night, is that correct, as you have described them?—you remember well what happened?

A. No, sir.

Q. You sat here, Mr. Gardner, yesterday and today, and heard the Doctor describe how your wife, Bertha, was beaten, didn't you?

A. I heard his report, yes, sir.

Q. And you tell us now that you hit her one time?

A. No, sir, I didn't say that.

Q. What did you say?

A. I said I remember hitting her with the back of my hand.

Q. Earlier, you told us that you were the father of four children?

A. Yes, sir, I am.

Q. And you named them and told us how old they were—did you think about them when you were doing this to your wife?

A. Sir, I wasn't in my right mind.

Q. Awhile ago, I remember you telling the jury that you were trying to get Bertha Mae into the house, and she fell, is that correct?

A. I don't understand, which fall?

Q. Did you tell us awhile ago that when you returned from the Sugar Mill you were attempting to get Bertha Mae into the house and she wouldn't go?

A. No, sir, I didn't say that.

Q. Tell me what happened?

A. When we—as I said, when we got to the house, while we was still in the car, Wayne and I had a drink of whiskey. Had a night cap. We got out of the car, and my wife and I went into the house.

Q. Did you say you had to take her into the house and clean her up? In the bath tub?

A. Not at this time, no, sir.

Q. Later you did? Is that correct?

A. I don't understand the question.

Q. Did you later take Bertha into the bath room and into the bath tub for the purpose of cleaning her up?

A. Later? Yes, sir.

Q. Is that where you pulled all the hair out of her head?

A. I don't remember doing that, sir.

Q. I remember you told us earlier that she tried to snatch away from you?

A. Yes, sir, on the road.

Q. Do you remember the photographs that you saw? Pictures of her?

A. Yes, sir.

Q. Is that what she deserved?

A. No, sir.

Q. You have been a drinking man for some time, haven't you, Mr. Gardner?

A. Yes, sir, I have drank quite a bit.

Q. Drinking is nothing new to you?

A. It is, I'm not a every day drinking man.

Q. It was not uncommon for you to drink either, was it?

A. That quantity, yes, sir.

Q. You tell us that there was no argument between you and Bertha?

A. I said there was no hard argument between me and my wife.

Q. Why in heavens name did you beat her like this?

A. Sir, I don't remember beating her.

MR. KOVACH: Your Honor, I don't believe the defendant testified that he beat her, he only testified that he slapped her with the back of his hand.

MR. GREEN: No further questions.

WHEREUPON, the witness was excused from the witness stand.

MR. GREEN: The state will waive any right to argument on this particular phase of the procedure, your Honor.

MR. KOVACH: May it please the Court, Lady and gentlemen of the jury, you have just heard the second phase of this trial, that is the phase where the evidence is submitted, wherein you are to take this evidence and file with the court advisory recommendation as to whether or not Mr. Gardner is entitled to mercy or the fact that the recommendation be that he be sentenced to death. The court will instruct you on this in a moment. I have only a few things I would like to point out to you. Mr. Gardner, Dan, sat here and he told you all that he could remember. He can't really remember any more apparently. We totalled up twenty-four shots of Vodka, beer that he can recall—that is a prodigious amount of alcohol, I don't care whether the man has been drinking for many years, that is an awfully lot of alcohol. He also testified to you that he had not had one thing to eat, he did say he had a cup of coffee when he first woke up that morning. That is a fantastic amount of alcohol and nothing, nothing, to off set it. That drinking went on from approximately Ten thirty in the morning until when ever he got home, and he still had some whiskey there, had a shot of whiskey at the car, a night cap. Lady and gentlemen of the jury, we would request that you think very seriously about this situation. Dan Gardner says, and he is correct, he has four children. The children need a father. They don't have a mother any more. They need some one there. We would request that you grant mercy in your advisory sentence.

THE COURT: Ladies and gentlemen of the jury, this

trial is divided into two parts. The first part ended with the entry of your verdict. The second part was concerned with the hearing of testimony and evidence for the purpose of insuring the entry of a sentence which will be just in the light of the circumstances. In serving now you act as advisory to the court, the court having the final discretion and responsibility in this matter and the power of independent judgment. Under these procedures it is now your duty to determine by majority vote whether or not you advise the imposition of the death penalty based upon the following circumstances: (1) whether sufficient aggravating circumstances as hereinafter enumerated exist; (2) whether sufficient litigating [sic] circumstances exist as hereinafter enumerated which outweigh the aggravating circumstances found to exist, and (3) based on these considerations whether the defendant should be sentenced to life or death. Aggravating circumstances are limited by statute to the following: (a) the capital felony was committed by a person under sentence of any prison; (b) the defendant was previously convicted of another capital felony or a felony involving the use or threat of violence to a person, (d) the defendant knowingly created a great risk of death to many persons; (d) the capital felony was committed while the defendant was engaged or was an accomplice in the commission of or attempt to commit or flight after committing or attempting to commit any rape, robbery, arson, burglarly, kidnapping, aircraft pirarcy [sic], or the unlawful throwing, placing, or discharging of a destructive device or bomb, (e) the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting escape from custody; (f) the capital felony was committed for pecuniary gain . . . (g) the capital felony was committed to disrupt or hender the lawful exercise of any governmental function or the enforcement of law. Litigating [sic] circumstances by statute are A) the defendant has no significant history or prior criminal activity. B) The capital felony was committed while the defendant was under the infiuence of extreme mental or emotional disturbance; C) The victim was was nsic] participant in the defendant's conduct or consented to the act; D) The defendant was an accomplice in the capital

felony committed by another person and his participation was relatively minor; E) The defendant acted under extreme durress or under the substantial nomination of another person; F) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to a requirement of law was substantially impaired; G) The age of the defendant at the time of the crime; H) The evidence introduced in this second phase of the trial.

Your determination must be made objectively without bias or prejudice to the State or to the defendant. You will be given these instructions to take with you to the jury room. You will also be given two advisory sentences which I will now read to you:

THE COURT: Mr. Green, would you and Mr. Kovach step up here a minute?

(Mr. Green and Mr. Kovach approach bench, discussion at the bench) (Discussion at bench ended)

THE COURT: In reviewing the jury instructions, one of the aggravating circumstances and in fact the aggravating circumstance on which the State presented its evidence was ommitted [sic], and it is as follows: The capital felony was especially heinous, atrocious or cruel, so I will have to add this to these jury instructions which I have just read to you. This will have to be re-typed.

(The Court hands paper to Investigator Keith Owens for deliver [sic] to secretary to be re-typed)

THE COURT: It will take a few moments to re-type this. I will now read you the two forms of advisory sentences. You will take these with you into the jury room, not only the instructions, but also the two forms of advisory sentences. I will read them to you now.

We the jury have heard evidence under the sentencing procedure in the above case as to whether aggravating circumstances were so defined in the court's charge existed in the capital offense here involved and whether sufficient mitigating circumstances as defined in the court's charge to outweigh such aggravating circumstances we find and advise that the aggravating circumstances do outweigh the mitigating circumstances, we therefore advise the court that a death sentence should be imposed herein upon the

defendant by the court, dated this blank day of January 1974, and a place for your foreman to sign.

The other form of the advisory sentence would be, we the jury have heard evidence under the sentencing procedure in the above cause as to whether aggravating circumstances were so defined in the court's charge existed in the capital offense here involved and whether sufficient mitigating circumstances are defined in the court's charge to outweigh such aggravating circumstances and do find and advise that the litigating [sic] circumstances do outweigh the aggravating circumstances, we therefore advise the court that a life sentence should be imposed herein upon the defendant by the court, dated this blank day of January, 1974, and a place for the foreman to sign.

THE COURT: It will take a few moments to re-type that, so if you, Mr. Bailiff, would take the jury to the jury room.

WHEREUPON, the jury was removed from the court room to the jury room.

WHEREUPON, the defendant was taken to the holding room.

THE COURT: Court will be in recess for ten minutes.

WHEREUPON, court was in session after recess: Defendant seated in the court room at defense table.

WHEREUPON, the jury was returned to the jury box.

THE COURT: Members of the jury, I am going to reread the entire jury instructions which have now been corrected. Lady and gentlemen of the jury, this trial is divided into two parts. The first part ended with the entry of your verdict. The second part was concerned with the hearing of testimony and evidence for the purpose of insuring the entry of a sentence which will be just in the light of the circumstances. In serving now, you act as advisors to the court which has the final discretion and responsibility in the matter with power of independent judgment. Under these procedures, it is now your duty to determine by a majority vote whether or not you advise the imposition of the death penalty based upon (1) whether sufficient aggravating circumstances as hereinafter enumerated exist; (2) whether sufficient litigating [sic] circumstances exist as hereinafter

enumerated which outweigh the aggravating circumstances found to exist and (3) based on these considerations whether the defendant should be sentenced to life or death. Aggravating circumstances are limited by statute to the following: (a) the capital felony was committed by a person under sentence of any prison; (b) the defendant was previously convicted of another capital felony, or a felony involving the use or threat of violence to a person; (c) the defendant knowingly created a great risk of death to many persons; (d) the capital felony was committed while the defendant was engaged or was an accomplice in the commission of or attempt to commit or flight after committing or attempting to commit any rape, robbery, arson, burglarly, kidnapping, aircraft pirarcy [sic] or the unlawful throwing, placing, or discharging of a destructive device or bomb; (e) the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody; (f) the capital felony was committed for pecuniary gain; (g) the capital felony was committed to disrupt or hender the lawful exercise of any governmental function or the enforcement of law; (h) the capital felony was especially heinous, atrocious, or cruel. Mitigating circumstances by statute are (a) the defendant has no significant history or prior criminal activity; (b) the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance; (c) the victim was [a] participant in the defendant's conduct or consented to the act; (d) the defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor; (e) the defendant acted under extreme durress [sic] or under the substantial nomination of another person; (f) the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirement of law was substantially impaired; (g) the age of the defendant at the time of the crime; and (h) the evidence introduced in this second phase of the trial.

Your determination must be made objectively without bias or prejudice to the State or to the defendant. Are there

any additions or corrections to be made to the instructions just given?

MR. GREE: None, your Honor.

MR. KOVACH: No, your Honor.

THE COURT: Mr. Bailiff, will you hand these papers to the foreman with the pictures that were introduced into evidence.

WHEREUPON, the jury was escorted to the jury room, 5:20 P.M.

THE COURT: At this time, for the record, I am going to order a pre-sentence investigation of this defendant.

WHEREUPON, the defendant was escorted to the holding room.

THE COURT: Court will be in recess until the jury returns.

WHEREUPON, court was in session, 5:45 P.M.; defendant seated at defense table; Attorney W.T. Green present for the State, Attorney Michael Kovach present with the defendant;

WHEREUPON the jury was returned to the court room.

THE COURT: Mr. Foreman, have a majority of the jury arrived at an advisory sentence for the Court?

FOREMAN: Yes, sir.

THE COURT: Would you hand it to the bailiff, please?

(Foreman hands paper to the bailiff, bailiff hands paper to the court)

THE COURT: Would you publish the advisory sentence?

DEPUTY CLERK: In the circuit Court of the Fifth Judicial Circuit of the State of Florida in and for Citrus County, Criminal Case Number 73-132, State of Florida, vs. Daniel Wilber Gardner, Defendant, Advisory Sentence: We the jury have heard evidence under the sentencing procedure in the above cause as to whether aggravating circumstances which were so defined in the court's charge existed in the capital offense herein involved and whether sufficient litigating circumstances are defined in the court's charge to outweigh such aggravating circumstances do find and advise that the litigating [sic] circumstances do outweigh the aggravating circumstances. We therefore advise the court that a life sentence should be imposed herein upon

the defendant by the court. Dated this the 10th day of January, 1974, signed Joseph F. Schoen, foreman.

WHEREUPON, that ended the proceedings.

Testimony Begin In Murder Trial

Mother Weeps Over Victim's Photo

[Verdict]

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR CITRUS COUNTY

Criminal Case No. 73-132-CA-01

STATE OF FLORIDA

vs.

DANIEL WILBUR GARDNER,

Defendant,

VERDICT

We the Jury, find the Defendant DANIEL WILBUR GARDNER, Guilty as charged in the Indictment of Murder in the First Degree.

So say we all.

Dated this the 10th day of January, 1974.

/S/ JOSEPH F. SCHOEN
Foreman of Jury

[Order for Pre-Sentence Investigation]

FORM J-2

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT OF FLORIDA,
IN AND FOR Citrus COUNTY.
CRIMINAL CASE NO. 72-132CF-4-A

Charles Fitzpatrick Asst Public Defender

Now, on this day, came in person the above-named defendant, with his counsel, Leonard Rubinstein into open court, and entered his plea of not guilty to the charge of Murder in the First Degree as defined by Section 782.04 of the Florida Statutes; and thereupon said defendant was duly tried by a jury, with his attorney representing him at such trial, and the jury having brought in its verdict finding the defendant guilty of the crime of Murder in the First Degree;

The court adjudges him to be guilty of the crime of Murder in the First Degree.

IT IS, THEREFORE, CONSIDERED, ORDERED AND ADJUDGED that the Probation & Parole Supervisor of District 8 of the State of Florida be and he is hereby directed to make pre-sentence investigation in the above cause and to report the result of such investigation to this court, and that the imposition of sentence in this cause be suspended pending the receipt by the court of such report.

DONE AND ORDERED in open court at Inverness, Citrus County, Florida, this 10th day of January, A. D. 19 74

John W. Bryant
Circuit Judge

[Advisory Jury Sentence]

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR CITRUS COUNTY

CRIMINAL CASE NO. 73-132

STATE OF FLORIDA,

vs.

DANIEL WILBER GARDNER,

defendant.

ADVISORY SENTENCE

We, the Jury, have heard evidence, under the sentencing procedure in the above cause, as to whether aggravating circumstances which were so defined in the Court's charge, existed in the capital offense here involved, and whether sufficient mitigating circumstances are defined in the Court's charge to outweigh such aggravating circumstances, do find and advise that the mitigating circumstances do outweigh the aggravating circumstances.

We therefore advise the Court that *a life* sentence should be imposed herein upon the defendant by the Court.

Dated this 10th day of January, 1974.

/S/ JOSEPH F. SCHOEN
FOREMAN

[Petitioner's Motion for a New Trial, January 22, 1974]

MOTION FOR A NEW TRIAL

Comes now Defendant, Daniel Wilbur Gardner, by and through his undersigned attorney, and moves this Court to grant him a new trial in that the Defendant feels that his motions for a directed verdict were improperly denied by this Court in that the State wholly and utterly failed to present sufficient evidence to prove beyond and to the exclusion of a reasonable doubt that the Defendant did with premeditated design murder his wife, Bertha Mae Gardner.

[Pre-Sentence Investigation Report (Non-confidential Portion).]*

FLORIDA PAROLE AND PROBATION COMMISSION

Presentence Investigation

Court - Circuit	County - Citrus
Name Daniel Wilbur Gardner	Docket # 73-132
	District 42 Case # 641
Address Route 1, Box 35, Homosassa,Fla.	Offense - Murder in the 1st Digree [sic]
Age 39 DOB 2-9-34 RACE/SEX W/M	Date of adjudication
	Date of adjudication W/held
Marital Status Widower	Arrest Date 6-30-73
Legal Residence Citrus County - 2 years	Amount of Bond Release date
Social Security #	Days in Jail Since Arrest
	Arresting Agency S.O. Citrus County
Judge J.W. Booth	
Prosecutor W. T. Green	
Defense Atty Kovacs	
Disposition Guilty by Jury as charged 1-10-74	

I. OFFENSE - Information resume:

a) Information Resume: Information #73-132 charged that Daniel Wilbur Gardner did on 6-30-73, did in a premeditated design kill his wife, Bertha Mae Gardner.

b) Court Appearances: The subject on 1-7-74, went to trial on Murder in the 1st Degree and was found guilty by a jury on 1-10-74 for 1st Degree Murder and they also recommended mercy in this case.

* This portion of the Pre-Sentence Investigation Report appears at pages 8-10 of the Supplement to Transcript of Record in the Supreme Court of Florida.

c) Co-Defendant Status: None.

d) Circumstances: Investigation reveals that on 6-30-73, at approximately 7:00 S.O. Citrus County received a call to the Gardner residence in Homosassa to investigate a death. Deputy Shelton arrived on the scene to discover the nude body of Bertha Mae Gardner lying on the bed in one of the bedrooms. His observation was that the victim had bruises, contusions, cuts on her legs and cuts around her pubic area. The victim appeared to have been severly [sic] beat on and had bleed [sic] profusely from her vagina. Her hair had been pulled from head in such a large quantity, that it appeared that she had been partially scalped. In attempting to find out, what happened, Deputy Shelton from several sources compiled the following information.

On 6-29-73, the subject left the home around 10:00 A.M. supposedly to go out and drink. He apparently continued drinking until late that night, most of the drinking being done in and around the Sugar Mill Tavern in Homosassa. Later that night the subjects wife, also the victim in this case, came to the Sugar Mill tavern and apparently started to argue with the subject over where he had been all day. From all indications this arguing continued when the subject and his wife went home. Several witnesses stated that both the subject and his wife were under the influence of alcohol. During the trial, several witnesses testified to the fact that the subject apparently had a drag out [sic] argument that ended in his mother in laws trailer next door and continued when he returned his wife to their trailer. During the night, noises were head [sic] comeing [sic] from the trailer, but no one cared to investigate what was happening. From all indications the subject apparently administered a severe beating to his wife which resulted in her death.

e) Defendant's Statement: Subject stated that he had been drinking practically all day on the 29th at the sugar mill, stated that his wife came in later that night and she apparently had been drinking. He stated that they both went home in the company of some people at the sugar mill and had an argument about where the kids were, stating he went next door to his mother in laws to see where his children were, and apparently broked [sic] down the door. He stated his wife came after him naked and he tried to get her home and she fell down stating he finally got her into the trailer and tried to wash her off because she had fell in the dirt. He stated then he apparently lost his sense of where he was at and he apparently went to sleep in the next thing he got up he saw her lying in the bed. He stated he figured she was hurt and he tried to give mouth to mouth resisitation and this failed and he apparently got hold of his mother in law next door who finally called the police. The subject kept saying over and over again he does not remember ever attempting to hit his wife, doesn't remember what happened until he woke up in the morning.

PRE-SENTENCE INVESTIGATION
PAGE 2 - DANIEL WILBUR GARDNER

II. PRIOR ARRESTS & CONVICTIONS: A check of local law enforcement authorities and the FBI reveal the following:

Place	Date	Charge	Disposition
P.D. Jacksonville,Fla.	5-5-52	Disorderly Conduct & Fighting	Fine $25
P.D. Jacksonville, Fla.	6-1-52	Vagrancy	Dismissed
Air Force Inlisted	9-26-52	Inlistment	
S.O. Jacksonville,Fla.	10-25-56	Malice Miscnief	No dis. shown
P.D. Jacksonville,Fla.	11-6-65	Disorderly Conduct (Drunk)	Fine $10
P.D. Tampa, Florida	6-27-58	Drunk	Fine $15
S.O. Ft. Myers,Fla.	7-20-60	Investigation of Aggravated Assault	Released
S.O. Inverness,Fla.	1-3-68	Assault WITC Murder	Nolle Prossed 8-26-68
S.O. Inverness, Fla.	10-26-68	Worthless Check($25)	Restitution + Court Cost
S.O. Inverness, Fla.	1-10-69	Disorderly Conduct	$30 fine
S.O. Inverness, Fla.	4-2-70	Assault & Battery	Dismissed
S.O. Inverness, Fla.	4-21-72	Assault & Battery	Dismissed

a) Detainers: None

III. PERSONAL HISTORY:

a) Family:

Parents: Father, William G. Gardner, age 36, deceased. Mother, Nellie Murkerson, age 58, occupation housewife. Step father is Ernest Murkerson.

Siblings:
Brothers:

Name	Age	Residence	Occupation
Mr. Gardner	46	Bradon	Comm. Fisherman
David Murkerson	37	Homosassa	Carpet
Davie Murkerson	33	Homosassa	Carpet

Sisters:

Voncille Gardner 27 Deceased

Defendant: The above 39 year dold white male was born 2-9-34 to the above parents in Homosassa, Florida.

b) Education: Subject left school at age 15 completing the 8th grade at Southside Grade School, Jacksonville, Florida. Subject states he was a fair student.

c) Marital Status: The subject has been married twice, first to one Jo Ann A. Youdal, which he married in1958 in Jacksonville, Florida. Subject stated that no children were born to this union and they just couldn't get along. Subject stated he divorced his first wife in Citrus County in 1966.

The subject then married one Bertha Mae Hutchinson, the victim in this case, in Homosassa, Florida, in 1968. Born to this union are 4 children. Subject stated that he had a fairly good relationship with his second wife. He stated that their main trouble was her mother, who was always butting into their affairs and causing trouble between him and his wife. He did stated that both of them drank and this was probably some of their troubles.

d) Residence: The subject has resided most of his life in the Homosassa Area, and at the time of the incident he was residing in a trailer, which was a three bedroom in Old Homosassa, Florida.

e) Religion: The subject states he was the protestant faith. He states he is a poor member of that or any church.

f) Interests & Activities: Subject states that his leisure hours are spent mostly at home with his family.

PRE-SENTENCE INVESTIGATION
PAGE 3-DANIEL WILBUR GARDNER

he subject states that he would consider himself a heavy beer drinker and that e has never been involved with any drugs at all.

g) Military: Yes
How entered: Enlisted Date: 9-26-52 Branch: Air Force
Highest Rank: Airman 1st Class
Duties: Crafts
Court Martials: None
Discharge Date: 9-27-56 Type: General Discharge under honorable conditions.

h) Health: The subject states that he is in good condition at the present time and has no problems.

i) Employment: Subject stated at the time of this incidence he was unemployed for approximately two months, but he did get money by doing odd jobs of carpentry around Homosassa. Prior to this he worked for Florida Power Corporation on and off for the past five years, as a carpenter.

j) Economic Status: The subject claims no assets and no liabilities.

IV. COURT OFFICIALS STATEMENTS: Prosecuting Attorney, Trewick Green states he remembers the case, said the subject had a fair trial and he will rely on the information revealed by the PSI.

Defense Attorney, Public Defender Kovacs, stated he has previously entered a plea for mercy for the subject and he also noted that the jury also entered a plea for mercy for the subject. He stated he will go by this plea.

Law enforcement authorities are quite strong in their opinion of the subject, they consider the subject a menace to society. They feel he should not be let to roam the streets for what he didto his wife. They stated that the subject had a long line of assault charges on his wife, that should be taken into count about this subject.

V. PLAN: Should Probation be the decision of the Court, the subject stated he will continue residing with his trailer in Homosassa in order to make a home for his children, and stated he will surely be able to find employment.

Respectfully submitted,

Michael C.Dippolito,
District Supervisor

MCD/kb
1-28-74

[Trial Court's Findings of Fact]

IN THE CIRCUIT COURT OF THE FIFTH
JUDICIAL CIRCUIT OF FLORIDA,
IN AND FOR CITRUS COUNTY.

CRIMINAL CASE NO. 73-132

STATE OF FLORIDA,

vs.

DANIEL WILBUR GARDNER,

Defendant.

FINDINGS OF FACT

THIS CAUSE coming on this day to be considered pursuant to the provisions of Section 921.141, Florida Statutes, as amended by Chapter 72-724, Laws of Florida, after (1) the conviction of the defendant, Daniel Wilbur Gardner, of Murder in the First Degree, by a duly impaneled jury and his adjudication of guilt of such offense, (2) the rendition by such jury at the conclusion of the sentencing proceeding of an Advisory Sentence recommending the imposition of a life sentence, (3) the receipt of a pre-sentence investigative report on said defendant by the undersigned and receipt by the State and defendant's attorney of a copy of that portion thereof to which they are entitled, and after carefully considering and weighing the evidence presented during such trial and sentencing proceeding, the arguments' of the attorneys as to the sentence to be imposed and reviewing the factual information contained in said pre-sentence investigation, the undersigned concludes and determines that aggravating circumstances exist, to-wit: The capital felony was especially heinous, atrocious or cruel; and that such aggravating circumstances outweighs the mitigating circumstance, to-wit: none; and based upon the records of such trial and sentencing proceedings makes the following findings of facts, to-wit:

1. That the victim died as a result of especially heinous, atrocious and cruel acts committed by the defendant, the nature and extent of which are reflected by the testimony of Dr. William H. Shutze, District Medical Examiner of the Fifth Judicial Circuit of the State of Florida, as follows:

(a) At least one hundred bruises upon her head, both eyes, nose, abdomen, arms, both breasts, chest, back, thighs and legs.

(b) Large patches of healthy hair pulled from her head as a result of her hair being grabbed, leaving bald spots.

(c) Abrasions, bruises and contusions to the head as a result of her hair being grabbed and her head pushed against the wall or floor.

(d) Massive hemorrhage of the scalp, small hemorrhages under the covering of the brain, and contusions of the nose.

(e) Massive hemorrhage of the pubic area, including the inner surfaces of the thigh and the labia of the vulva.

(f) Bruised and swollen external genitalia.

(g) Hemorrhage in and around the right adrenal gland and right kidney.

(h) A large laceration on the perineum extending from the posterior part of the vagina toward the anus.

(i) Large tears inside the vagina from the outside entrance all the way to the back as far as it could go, caused by a broom stick, bat or bottle.

(j) A large laceration or tear of the entire right side of the liver.

(k) The peritoneal cavity or bone located in the pubic area in the lower part of the body, was broken up into small pieces by blunt injury such as being stomped on.

and based thereon concludes that the death sentence should be imposed upon said defendant.

Dated this 30th day of January, 1974.

/S/ JOHN W. BOOTH
Circuit Judge

[Judgment and Sentence]

IN THE CIRCUIT COURT OF THE FIFTH
JUDICIAL CIRCUIT OF FLORIDA,
IN AND FOR CITRUS COUNTY.

CRIMINAL CASE NO. 73-132

STATE OF FLORIDA,

vs.

DANIEL WILBUR GARDNER,

Defendant.

JUDGMENT AND SENTENCE

The above named defendant, with his counsel, Charles B. Fitzpatrick, Assistant Public Defender heretofore entered his plea of not guilty to the charge of Murder in the First Degree as defined by Section 782.04, as amended, of the Florida Statutes; and thereupon said defendant was duly tried by a jury, with his attorney representing him at such trial; and the jury having brought in its Verdict finding the defendant guilty of Murder in the First Degree; and rendered its Advisory Verdict; and the Court having adjudicated said defendant guilty of said offense and filed its Findings of Fact herein.

And the defendant being asked by the court whether he had anything to say why sentence of the law should not now be pronounced upon him, and saying nothing to preclude such sentence; it is, therefore,

The JUDGMENT, ORDER AND SENTENCE of the court that he be electrocuted til dead in the manner directed by the laws of the State of Florida.

DONE AND ORDERED in open court at Inverness, Citrus County, Florida, this 30th day of January, 1974.

/S/ JOHN W. BOOTH
Circuit Judge

[Petitioner's Motion for a New Trial, February 5, 1974.]

MOTION FOR A NEW TRIAL

Comes now the Defendant, Daniel Wilbur Gardner, by and through his undersigned attorney, and moves this Court for a new trial, and alleges that prejudicial error occurred as follows:

1. That under the Supreme Court's ruling in *Witherspoon vs. Illinois*, 389 U.S. 1035, 88 S.Ct. 793, 19 L.Ed.822, the Supreme Court ruled that in a non-bifurcated trial, the prosecutor could be allowed to ask whether or not a juror would ever consider imposing the death penalty.

2. That subsequent to the enactment of Florida Session Law 72-724, Florida Statute 921.141 provides for two (2) deliberations by a Florida jury—one to consider guilt or innocence, and subsequent deliberation to consider mercy or no mercy.

3. That any questions asked by the prosecutor relating to whether or not a juror would ever consider capital punishment in no way relates to, is not reasonably related to nor relevant to a decision on the defendant's guilt or innocence and an answer by a juror that the juror could not consider the death penalty would not in any way affect the ability of the juror to participate fully and freely in deliberations on the questions of innocence or guilt.

4. That in allowing the prosecutor to ask Witherspoon-type questions and to be granted challenges for cause on the basis that the juror could not consider the death penalty unduly prejudices the defendant's right to a fair trial, in violation of his right to a fair and impartial jury trial and to due process in violation of the Fifth and Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9, 16 and 22 of the Florida State Constitution.

5. That the Grand Jury which indicted the Defendant was composed of persons between the ages of eighteen (18) to twenty-one (21) in contravention of Florida Statute 40.01.

6. That the Grand Jury proceedings were not reported

by a qualified Court Reporter, and no record of these proceedings exists or can be constructed. The inability to produce a record of the Grand Jury proceedings prevents the Defendant from inquiring into possible inconsistent statements by witnesses beforethe Grand Jury. Chapter 40, Florida Statutes, sets out qualifications of persons who can sit as Grand Jurors, yet without a record of the secret proceedings there is no method to review the procedure. The absence of a record denies to the Defendant the effective assistance of counsel as guaranteed to him in the Sixth Amendment to the United States Constitution, and in Article I, Section 16, of the Florida State Constitution, and violates his right to be informed of the charges against him in contravention of the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, Section 16, of the Florida State Constitution; and impedes his access to the Courts and his right to confront witnesses against him, in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Section 16 and 21 of the Florida State Constitution.

7. That Florida Statute, Section 782.04 and 921.141 are unconstitutionally vague in violation of the due process and equal protection guaranteed to the Defendant by the Fifth and Fourteenth Amendments to the Constitution of the United States, and Article I, Section 16 of the Florida State Constitution, because a Grand Jury, when called to consider bringing an Indictment, would be unable to distinguish the language between murder in the first degree and murder in the second degree, therefore, the Indictment for murder was unconstitutionally discretionary in application.

8. That Florida Statute 782.04 is unconstitutionally vague in violation of the due process and equal protection guaranteed to the Defendant by the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, Section 2 and 9 of the Florida State Constitution, because the trial judge cannot determine what specific crimes are embodied within the divisions of murder in the first degree and murder in the second degree, in order to properly instruct the jury and conduct a trial.

9. That Florida Statutes 782.04, 775.082 and 921.141 provide for:

a. Cruel and/or unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 17 of the Florida State Constitution.

b. Arbitrary infliction of punishment so as to deprive the defendant of life, liberty or property without due process or equal protection of law, in violation of the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 9 and 16 of the Florida State Constitution.

c. Insufficient and arbitrary standards which are vague, indefinite and uncertain so as to be contrary to the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 9 and 16 of the Florida State Constitution.

d. Vague, ambiguous and indefinite provisions so as to deprive the defendant of his right to know the nature of the charges, the differentiation between the degrees of homicide, and to be able to prepare a defense accordingly, in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 2, 9 and 16 of the Florida State Constitution.

10. That Florida Statute 921.141 placed upon the defendant the burden of proving mitigating circumstances in violation of his rights against self-incrimination as provided in the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 2 and 9 of the Florida State Constitution.

11. That the use of the death penalty pursuant to Florida Statute 921.141 by the State of Florida, contravenes the Supreme Court's decision in *Furman vs. Ga.*, 408 U.S. 238, 33 L.Ed.2d 346, 92 S.Ct.2726(1972).

12. That Florida Statute 775.082, in requiring a defendant convicted of first degree murder and sentenced to life imprisonment to serve twenty-five (25) calendar years is a violation of due process and equal protection of the law as guaranteed to the defendant in the Fifth and Fourteenth Amendments to the United States Constitution, and Article

I, Sections 2 and 9 of the Florida State Constitution, and that the punishment bears no rational relationship whatsoever to the defendant's acts or background, and cannot be justified to serve any recognized penalogical purpose.

13. That the use of the death penalty is cruel and/or unusual punishment in violation of the Eighth Amendment to the United States Constitution, and Article I, Section 17 of the Florida State Constitution.

14. That even if the death penalty is held to be constitutional, death by electrocution as provided in Florida Statute 922.10 is cruel and/or unusual punishment in violation of the Eighth Amendment to the United States Constitution, and Article I, Section 17, of the Florida State Constitution.

15. That Florida Statute 921.141 violates the defendant's right to due process and equal protection guaranteed to him in the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 2 and 9 of the Florida State Constitution, in that only persons convicted or adjudicated guilty of a capital crime may have evidence introduced that "the court deems to have probative value . . . regardless of its admissability under the exclusionary rules of evidence . . . ".

16. That Florida Statute 921.141 is unconstitutionally vague, denies effective appellate review of the defendant's sentence, and violates the due process and equal protection guaranteed to the defendant by the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, Section 2 and 9 of the Florida State Constitution, in that there is an absence of standards.

17. That Florida Statute 921.141 provides for arbitrary and discretionary exercise of the state's police power in circumstances where the arbitrary and discretionary exercise is not reasonably related to a valid state purpose, in violation of the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, Section 9 of the Florida State Constitution.

18. That the absence of any sufficient non-vague standards on aggravation or mitigation in Florida Statute 921.141 violates the due process guaranteed to the defendant in the Fifth and Fourteenth Amendments to the United

States Constitution, and Article I, Section 9 of the Florida State Constitution, in that it is impossible for the trial judge to instruct the jury in a manner that is not discretionary since the designated circumstances of aggravation and mitigation are vague, incomplete and indefinite.

19. That the circumstances to be considered in mitigation under Florida Statute 921.141, are inadequate, discretionary, arbitrary, insufficient and vague, in violation of the due process and equal protection clauses in the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 2 and 9 of the Florida State Constitution, in that omitted by statute from consideration, and by necessity omitted from the judge's instructions to the jury, are mitigating circumstances, including: the defendant's military history, the defendant's honorable conduct or bravery, the defendant's motive (if appropriate), the defendant's family and it's needs, the defendant's prior suffering from other than mental conditions, the defendant's prior or subsequent moral convictions and behavior, that the death of a victim was a circumstance of chance, rather than a design of the defendant, that the defendant averted injury or exposure of injury to potential victims, that the defendant turned himself in and confessed, that the capital felony was not committed for pecuniary gain, the nature and character of the victim, and that the victim provoked or encouraged the acts of the defendant.

20. That, by limiting the circumstances in mitigation as delineated in Florida Statute 921.141, the Statute provides for cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments of the United States Constitution, and Article I, Section 17 of the Florida State Constitution.

21. That Florida Statute 921.141, in allowing the judge to overrule the jury's verdict of mercy violates the defendant's right to a trial by jury as guaranteed in the Sixth Amendment to the United States Constitution, and Article I, Sections 16 and 22 of the Florida State Constitution.

22. It was a reversible error and a play for the sympathy of the jury to permit the identification of the victim of a

crime by a member of the deceaseds family where other witnesses were available,

Furr vs. State 229 S2d 269 (Fla. App. 1969)

and the State clearly committed such error and evoked such sympathy in asking Glenda Mae Demeny to identify a photo of the deceased, Bertha Mae Gardner.

23. As to the photograph submitted into evidence by the State allegedly displaying hair of the deceased, the court erred in allowing this into evidence in that the witness, Deputy Shelton, had to be called upon by the State to explain to the jury the significance of the photograph, to wit: the dark spots in the picture are clumps of the deceased's hair. In order for any photograph to be admissable at all, it must be *clear* that it expresses pictorially what the witness would otherwise be called upon to describe as the result of his perception.

S. Gard, Florida Evidence 336 Authentication of Photographs (5th ed. 1967).

24. That the photograph submitted by the State by which they identified the deceased was inadmissable in that "indecent exposures are not permitted,"

Id. §243, Exhibition of Injuries in Court

and the photograph was a full length nude photograph and not used to display injuries thereon.

25. The State wholly and utterly failed to prove the elements of the Corpus Delicti beyond and to the exclusion of a reasonable doubt in that the State failed to prove that the criminal agency of the defendant to be the perpetrator of harm to the deceased

Sciortino v. State 115 S2d 93 (2dDCA, 1959)

A. The State failed to place the defendant in the same building or area at the time of the death of Bertha Mae Gardner.

B. The State failed to prove premeditation as is required in a case of first degree murder by any means other than a statement allegedly made to the investigating officer, which is unsupported by any of the evidence, the morning after the death of Bertha Mae Gardner, at a time when the defendant was possibly ill with grief over the loss

of his wife and extremely hungover, from excessive alcohol intake the day and night before.

C. The only two State witnesses who placed the defendant near the scene of Bertha Mae Gardner's death were her mother and her mothers boyfriend, Buckshot Leonecker, and their testimony was obviously prejudicial to defendant and yet obviously incompetent in that they were both caught in lies on the stand and the Court erred in failing to strike all of their testimony.

D. The State alleged circumstantial evidence in proving up the Corpus Delicti, but failed to follow the guidelines set out in *Lee vs. State* 117 So699 (Fla. 1928), *Freeman vs. State*, 101 S2d 887 (2d. DCA, 1958) which states that "When such circumstantial evidence is resorted to the proof must be convincing, satisfactory and unequivocal in such a degree as is compatible with the nature of the case beyond a reasonable doubt."

E. Even though the fact of premeditation is a question for the jury, the jury may not assume premeditation arising from the fact of a killing or homicide, *Newton vs. State*, 21 Fla. 53 (1884), and this is an element of the offense which must be proven beyond a reasonable doubt just as any other element of a crime, *Snipes vs. State*, 17 S2d. 93 (Fla.1962).

F. The State wholly failed to prove the defendant had any conscious appreciation of the intent to kill, the nature of the act for which he was charged or the probable result, *Mackiewicz vs. State*, 114 S2d.684(Fla. 1959).

26. The Court erred in admitting the testimony of the Medical Examiner in that he had acquired no positive identification of the alleged victim about whom he testified.

27. The Court erred in failing to call this case a mistrial in that the State presented extensive evidenciary exhibits and did not even attempt to place them in evidence but proffered them for view and probative value for the jury and in this manner avoided any rebuttal as to the weight to be placed on said probative value by the defense.

WHEREFORE, defendant moves this Honorable Court to grant him a new trial and to further rule that the new trial be treated as a non-capital case and tried before a six-man jury.

[Order Appointing Counsel for Appeal]

IN THE CIRCUIT COURT, IN AND FOR
CITRUS COUNTY, FLORIDA.

CASE NO. 73-132-CF-A-01

STATE OF FLORIDA,
Plaintiff,

vs.

DANIEL WILBUR GARDNER,
Defendant.

ORDER APPOINTING COUNSEL

This cause having come on for hearing, and it appearing that the defendant is insolvent and without funds to pursue an appeal, and the court being duly advised in the premises, it is hereby

ORDERED AND ADJUDGED that the office of the Public Defender of the Twelfth Judicial Circuit of Florida be, and is hereby appointed to aid and assist defendant in the preparation and presentation of defendant's appeal in this cause, and it is further

ORDERED AND ADJUDGED that all necessary costs of the appeal in this cause will be borne by Citrus County.

DONE AND ORDERED in Chambers this 20th day of February, 1974.

/S/ CIRCUIT JUDGE

[Petitioner's Assignments of Error, filed April 5, 1974, in the Circuit Court, in and for Citrus County, Florida.]

". . . . 12. The court erred in rendering its findings of fact in support of the death penalty because the court considered factors not based upon the record of the trial and the sentencing proceedings in contravention of Fla. Stat. §921.141(3).

13. The court erred in considering the presentence investigation of defendant . . . ."

[Opinion of the Supreme Court of Florida
131 So.2d 675 (Fla. 1975).]

DANIEL WILBUR GARDNER, *Appellant,*

vs.

STATE OF FLORIDA, *Appellee.*

No. 45106.

SUPREME COURT OF FLORIDA.

Feb. 26, 1975.

PER CURIAM.

This cause is before us on direct appeal from a conviction of murder in the first degree, and a sentence of death imposed upon appellant in the Circuit Court in and for Citrus County. We have jurisdiction pursuant to Article V, Section 3(b)(1), Constitution of Florida (1973).

On August 22, 1973, the Grand Jury of Citrus County returned an indictment against defendant charging him with first degree murder in that he on June 30, 1973, in Citrus County did unlawfully and from a premeditated design kill Bertha Mae Gardner, a human being, by striking her with a blunt instrument and did inflict in and upon the body of Bertha Mae Gardner a mortal wound from which she died.

After trial, the jury returned a verdict of guilty as charged in the indictment. After a post-conviction sentence advisory hearing, the jury returned an advisory sentence recommending that a life sentence be imposed. The trial judge adjudicated defendant guilty. After carefully considering and weighing all the evidence presented during the trial and sentencing proceedings, the trial judge, pursuant to the safeguards afforded by Section 921.141, Florida Statutes, entered written detailed findings of fact in support of the death penalty specifically stating as follows:

"[T]he undersigned concludes and determines that aggravating circumstances exist, to-wit: The capital felony was especially heinous, atrocious or cruel; and that such aggravating circumstances outweighs the mitigating circumstance, to-wit: none; and based upon the records of such trial and sentencing proceedings makes the following findings of facts, to-wit:

"1. That the victim died as a result of especially heinous, atrocious and cruel acts committed by the defendant, the nature and extent of which are reflected by the testimony of Dr. William H. Shutze, District Medical Examiner of the Fifth Judicial Circuit of the State of Florida, as follows:

"(a) At least one hundred bruises upon her head, both eyes, nose, abdomen, arms, both breasts, chest, back, thighs and legs.

"(b) Large patches of healthy hair pulled from her head as a result of her hair being grabbed, leaving bald spots.

"(c) Abrasions, bruises and contusions to the head as a result of her hair being grabbed and her head pushed against the wall or floor.

"(d) Massive hemorrhage of the scalp, small hemorrhages under the covering of the brain, and contusions of the nose.

"(e) Massive hemorrhage of the pubic area, including the inner surfaces of the thigh and the labia of the vulva.

"(f) Bruised and swollen external genitalia.

"(g) Hemorrhage in and around the right adrenal gland and right kidney.

"(h) A large laceration on the perineum extending from the posterior part of the vagina toward the anus.

"(i) Large tears inside the vagina from the outside entrance all the way to the back as far as it could go, caused by a broom stick, bat or bottle.

"(j) A large laceration or tear of the entire right side of the liver.

"(k) The peritoneal cavity or bone located in the pubic area in the lower part of the body, was broken up

into small pieces by blunt injury such as being stomped on.

and based thereon concludes that the death sentence should be imposed upon said defendant."

We have listened carefully to oral arguments, examined and considered the record in light of the assignments of error and briefs filed and we have also, pursuant to Rule 6.16(b), Florida Appellate Rules, reviewed the evidence to determine whether the interests of justice require a new trial, with the result that we find no reversible error is made to appear and the evidence in the record before us does not reveal that the ends of justice require that a new trial be awarded.

Upon considering all the mitigating and aggravating circumstances and careful review of the entire record in the cause, the trial court imposed the death penalty for the commission of the afore-described atrocious and heinous crime.

Accordingly, the judgment and sentence of the Circuit Court are hereby affirmed.

It is so ordered.

ADKINS, C. J. and ROBERTS, McCAIN, DEKLE and OVERTON, JJ., concur.

ERVIN (Retired), J., concurs in part and dissents in part with opinion with which BOYD, J., concurs.

ERVIN (Retired), Justice (concurring in part, and dissenting in part):

Appellant attacks the constitutionality of the death penalty as re-enacted in Florida in the wake of Furman v. Georgia, 408 U. S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), a decision whose ultimate impact remains to be seen. As previously expressed in my dissenting opinions in State v. Dixon (Fla.1973), 283 So.2d 1, and Spinkellink v. State, 313 S.2d 666, I have weighed Florida's new death penalty statutes, Sections 921.141, 782.04, and 775.082,

F.S., in the light of *Furman* and I find them constitutionally wanting.

My views of our present death penalty statutes are no less strong in this case than in those previously decided or yet to be decided thereunder; however, for fear of being unduly repetitious with the same futility as before, I forego revisiting the constitutionality issue but hold the belief that ultimately higher judicial authority will find the statutes unconstitutional prior to execution of this and other death sentences similarly imposed.

As required by Rule 6.16(b), F.A.R., I have reviewed the record below in its entirety and, notwithstanding my position with respect to the constitutionality of our death penalty statutes, I am compelled to conclude that Appellant's sentence should be commuted by this Court to life imprisonment on other grounds. The essential facts of the case are not disputed by the parties; however, they take issue with their application in determining Appellant's sentence.

Appellant first contends the trial judge erred in considering a presentence investigation report containing matter not properly admissible as aggravating circumstances specified in Section 921.141(6).[1] The record shows that prior to imposing sentence upon Appellant the trial judge ordered a presentence investigation report pursuant to Rule 3.710, Cr.P.R. Appellant argues that in considering the PSI report the trial judge vitiated the sentence by taking the process out of the bounds of Section 921.141, more specifically that Section 921.141 limits the judge to consideration of the aggravating circumstances therein enumerated and that the PSI report included matters which were detrimental to Appellant yet were not among the aggravating circumstances in the statute.

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[1] I note that Chapter 72-724, Laws of Florida, amending § 921.141, F.S., provided for 7 subsections including (6) Aggravating circumstances and (7) Mitigating circumstances. However, § 921.141., F.S. (1973), contains only 6 subsections including (5) Aggravating circumstances and (6) Mitigating circumstances, but retains references in subsections (1) and (3)(b) to subsections (6) Aggravating circumstances and (7) Mitigating circumstances. References thereto in my opinion assume the correctness of Chapter 72-724 and the incorrectness of § 921.141 as printed.

Appellant attacks the portions of the PSI report pertaining to prior arrests and convictions and court officials' statements. The prior arrests and convictions section included arrests over a ten-year period, none of which resulted in a conviction "of another capital felony or of a felony involving the use or threat of violence to the person," an aggravating circumstance provided in Section 921.141(6)(b). The court officials' statements sections contained the following entry:

> "Law enforcement authorities are quite strong in their opinion of the subject, they consider the subject a menace to society. They feel he should not be let to roam the streets for what he did to his wife. They stated that the subject had a long of line of assault charges on his wife, that should be taken into count [sic] about this subject."

Neither is such opinion one of the aggravating circumstances specified in Section 921.141(6).

While questioning the admissibility of such matters for purposes of sentencing, I recognize the statute provides that:

> "[E]vidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (6) and (7) of this section."

It is, however, logically inconsistent to allow the trial judge to consider such extraneous matters as those related above which are clearly not aggravating or mitigating circumstances expressly enumerated in the statute, in effect reintroducing the element of discretion in the trial judge which was abhorrent to a majority of the United States Supreme Court in *Furman* and which a majority of this Court saw barred by the operation of Section 921.141 in *Dixon*.

Appellee argues contrarily that PSI reports including such extraneous evidence must be admissible in order to inform the trial judge as to aggravating circumstances expressly included in the statute; but I cannot agree that such a broad rule is necessary to accomplish so limited an objective. Clearly, to me, the state could limit itself to showing by other less prejudicial means prior felony convictions

alone, if any, which constitute an aggravating circumstance under the statute. And, I might add, the burden is upon the state to adduce such limited evidence or it may be presumed by the trial judge that no aggravating circumstances exist which are not otherwise apparent from the trial or sentencing hearing.

Additionally, it appears from the record that there was a "confidential" portion of the PSI report made available to the trial judge *which was not provided to either Appellant or Appellee.* In fact, it is unclear from the record whether this Court has been provided the "confidential" portion thereof for our review, a critical final step between conviction and imposition of the death penalty—one of the safeguards outlined in *Dixon.* What evidence or opinion was contained in the "confidential" portion of the report is purely conjectural and absolutely unknown to and therefore unrebuttable by Appellant. We have no means of determining on review what role such "confidential" information played in the trial judge's sentence, and thus I would overturn Appellant's death sentence on the basis of this fundamental error alone.

Second, Appellant urges, and I agree, that the trial judge erred in failing to find a mitigating circumstance based upon Appellant's impaired mental state at the time of the crime induced by an unusually large amount of alcohol. The record shows uncontroverted evidence that Appellant had been drinking virtually all day and all night prior to killing his wife at some time after midnight. Section 921.141(7)(f) provides as a mitigating circumstance that "[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired." In *Dixon* this Court said:

> "Mental disturbance which interferes with but does not obviate the defendant's knowledge of right and wrong may also be considered as a mitigating circumstance. Fla.Stat. § 921.141(7)(f), F.S.A. Like subsection (b), this circumstance is provided to protect that person who, while legally answerable for his actions, may be deserving of some mitigation of sentence because of his mental state." 283 So.2d at 10.

With respect to this factor in mitigation, it is especially relevant that one of the psychiatrists ordered by the trial court to examine Appellant found:

> ". . . It is also my medical opinion *had he not been under the influence of alcohol at the time of the alleged crime, he would have been competent,* knowing right from wrong and being capable of adhering to the right. *It is my medical opinion the prisoner is an alcoholic . . .*" (Emphasis supplied.)

The only other court-appointed psychiatrist concurred in this finding in substantially similar language. It is my medical layman's understanding that the more enlightened perspective on alcoholism is that it is no longer considered simply an emotional weakness but rather a form of disease which, like other physical and mental ailments, can cause aberrant behavior and requires treatment. I have never found one's mental condition attributable to alcohol a sufficient legal excuse for a criminal act; however, based on the facts of this case, including the foregoing medical evidence, I consider it a mitigating circumstance under the statute to be considered together with and weighed against any aggravating circumstances. Furthermore, Appellant's conduct subsequent to the murder—including falling asleep with his wife's dead body, seeking his mother-in-law's help the next morning because his wife did not appear to be breathing properly, his failure to attempt to escape and his apparent remorse the next morning upon learning his wife was dead—is consistent with his temporary mental impairment at the time of the crime as a mitigating circumstance.

This was a crime of passion in a marital setting in which the excessive use of alcohol was a material factor resulting in the homicide. As I read our statutes, this type of crime does not merit the death penalty because the discretion exercised to impose that penalty here extends beyond the discretion the statutes repose in governmental officials for such purpose. I do not believe that the statutes contemplate that a crime of this nature is intended to be included in the heinous category warranting the death penalty. A drunken spree in which one of the spouses is killed traditionally has not resulted in the death penalty in this

state. There may, of course, be situations where murder of one's spouse would warrant the death penalty pursuant to the statutes, especially where there is a calculated design and premeditation to rid one of his or her spouse; but this case involving a crime of passion in a drunken spree hardly appears covered by the statutes.

For the reasons stated and the fact that this case will stand as a basis of comparison for future sentences under our new death penalty statutes, I fear the trial judge and this Court have erred in the instant circumstances in sentencing Appellant to death. Accordingly, I would affirm Appellant's conviction and vacate Appellant's sentence of death with directions to impose a sentence of life imprisonment in accordance with the recommendation of the jury.

BOYD, J., concurs.

Supreme Court of the United States

No. 74-6593

DANIEL WILBUR GARDNER,

Petitioner,

vs.

FLORIDA

ON PETITION FOR WRIT OF CERTIORARI TO THE Supreme Court of the State of Florida.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted, limited to question 2 presented by the petition which reads as follows:

"II. Whether nondisclosure of a 'confidential' portion of a pre-sentence investigation report to a defendant convicted of a capital crime constitutes a denial of the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States, and of the fair hearing as guaranteed by the Due Process Clause of the Fourteenth Amendment, in a case where the trial judge declines to accept a jury recommendation of a life sentence and instead imposes the death sentence partially on the basis of the pre-sentence report?"

July 6, 1976